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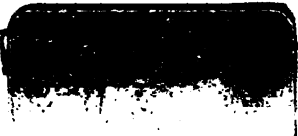
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REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

JEROME B. FISHER, REPORTER.

VOLUME CXVII.

1907.

**J. B. LYON COMPANY,
ALBANY, N. Y.**

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JEROME B. FISHER,
Reporter.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 181 N. Y. 490.)—[REP.]

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At a term of the Appellate Division, Third Department, it was, on January 9, 1907:

Ordered, that rule 12 of the rules of this court be rescinded, and the remaining rules be renumbered accordingly.

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Cases
DETERMINED IN THE
APPELLATE DIVISION
OF THE
SUPREME COURT
OF THE
State of New York.

FLORENCE NUNNALLY, Appellant, v. NEW YORKER ZEITUNG PUBLISH-
ING AND PRINTING COMPANY, Respondent.

First Department, January 11, 1907.

Libel — partial defense not pleaded as such demurrable — allegation that article was published of and concerning the plaintiff.

When a publication not naming the plaintiff, but alleged to have been printed of and concerning her, contains accusations of murder, robbery and illicit relations with the person murdered, defenses not set out as partial defenses nor in mitigation, which do not in any way justify the charges of murder or robbery, are bad on demurrer, although they may justify the accusation of illicit relations.

Although no specific person is named in such article as guilty of the offenses charged, the plaintiff may allege that it was published of and concerning her, and the complaint is good, as under such allegation direct proof may be made that she was the person referred to.

HOUGHTON, J., dissented, with memorandum.

APPEAL by the plaintiff, Florence Nunnally, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of July, 1906, upon the decision of the court rendered after a trial at the New York Special Term, overruling the plain-

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tiff's demurrers to the fourth and fifth defenses of the amended answer.

George H. D. Foster, for the appellant.

Benno Loewy, for the respondent.

PATTERSON, J.:

This appeal is from an interlocutory judgment overruling demurrers to the fourth and fifth defenses set up in the amended answer in this action, which was brought to recover damages for an alleged libel printed in a newspaper belonging to and circulated by the defendant. The article was printed in the German language and what appears to be a translation of it is annexed to the complaint. It begins with head lines printed in large type: "Dying Man Makes Accusation. Why Did Melles Die? Blamed Shortly Before His Death a Woman. Was it Poison or Alcohol? Coroner Scholer Of The Opinion That There Must be a Crime Behind It." The article then proceeded to state: "The police have once again a case for elucidation before them, which is surrounded by suspicious circumstances, as to who is responsible for the death of the theatrical agent Leon Melles." It proceeds further to state that Melles died, in the opinion of a Doctor Buffum, "from the effects of poison, apparently a mixture of chloral and cocaine, which was given to him as 'knockout drops.' A half hour before his death he cried out, 'Take that woman away from me. She has done it.' Then again he called, 'I wish to see that woman — she is responsible for this'—and during his death struggle he cried: 'There she is again' and threw up his hands, as if he wished to ward off a blow. * * * Shortly before his last gasp he gave the name and address of a young woman with whom he had been intimate for a year, as he himself and his father explained. Her identity is not made known by the police and the coroner, and it is said only that she is employed in a wholesale house downtown." It further states that "in a lucid moment Melles said: 'The last thing which I can remember is, that I was with the woman in my room in 28th street.'" And further, that "After Coroner Scholer had heard the statements of Dr. Buffum, of the father and of the two sisters of the dead man, he came to the conclusion that there must be more behind the matter than the accu-

sation made against the girl. The contradiction resulted from it, that the sweetheart, according to all testimony, was very devoted, but that he, nevertheless, had been robbed of his watch and his money when he came early yesterday to his father's home, where he arrived, apparently intoxicated, about 3 o'clock." Early in the morning, after the return of Melles, his father was awakened by his son groaning and sighing, and found him dying. "He sent for Dr. Buf-fum, who diagnosed the case as one of narcotic poisoning, and gave him a sedative. * * * Twice yesterday a woman's voice called up Mr. Melles on the telephone, and asked him whether Leon had arrived home safe. When she was told in the afternoon that he was in a very critical condition she said that she would call on him in the evening. A policeman waited for her appearance, but she did not appear, nor did she use the telephone again."

Although her name is not mentioned, the plaintiff makes the allegation that the alleged libel was printed of and concerning her. It contains accusations of murder and robbery. It also indicates that Melles and the plaintiff had illicit relations with each other. The fourth and fifth defenses interposed in the answer contain long and elaborate statements, which are, perhaps, sufficient as pleading matter in justification of the charge of unchastity of the plaintiff; but they do not in any way justify the charges of administering poison or of robbery. These defenses are not set up as partial defenses, nor in mitigation. They must be regarded as having been general defenses in justification. Their insufficiency as such is not open to discussion in this court. It was held in *Nunnally v. Mail & Express Co.* (decided June 15, 1906, 113 App. Div. 831); that where in an action of libel a defense is pleaded as a separate and distinct defense and does not go to the whole cause of action, but is merely partial, such defense is not good on demurrer, and for that reason the interlocutory judgment overruling the demurrers in the present action was wrong.

It is claimed, however, that the demurrers were properly overruled because the complaint was demurrable, and that upon demurrer to an answer the defendant may attack the sufficiency of the complaint. Applying that rule, we think the complaint was sufficient. Its allegation that the article complained of was published of and concerning the plaintiff, although her name was not mentioned,

was sufficient. (*Vunnally v. New-Yorker Staats-Zeitung*, 111 App. Div. 482; *affd.*, 186 N. Y. 532.) The matter complained of here is substantially the same as that in the case cited and is libelous *per se*. The plaintiff alleges that it was written of and concerning her, and in connection with that allegation she may make direct proof that she was the person to whom reference was made. The case last cited was not decided upon the allegation contained in the complaint therein that the plaintiff was discharged from her employment by reason of the publication in the *New-Yorker Staats-Zeitung*. It was said in the opinion, that *assuming* that the libel was so general in its character that it might apply to any of a great number of persons, and was only made to relate to the particular plaintiff by adoption of it as applicable to herself, that then the complaint contained a sufficient allegation to show its direct application to her.

The interlocutory judgment must be reversed, with costs, and the demurrer sustained, with costs, with leave to the defendant to amend the fourth and fifth separate defenses (if it is so advised) within twenty days from service of a copy of the order to be entered upon this decision, upon payment of costs in this court and in the court below.

INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred ; HOUGHTON, J., dissented.

HOUGHTON, J. (dissenting):

I dissent on the ground that the answer sets forth a justification at least of the charge of meretricious relations with Melles, and is sufficient in law on demurrer.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend on payment of costs in this court and in the court below. Order filed.

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First Department, January, 1907.

In the Matter of the Petition of MAYNARD N. CLEMENT, as State Commissioner of Excise of the State of New York, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 5,411, Issued to HENRIETTA MARTIN, Respondent..

First Department, January 11, 1907.

Intoxicating liquors — sale of liquors on Sunday — when sale by hotel-keeper not made to guest.

In order to justify a hotelkeeper in selling liquor on Sunday it must appear that the person to whom the liquor is sold is one who in good faith occupies a room in the hotel, or who during the hours when meals were regularly served resorted to the hotel for the purpose of obtaining and actually orders and obtains at such time in good faith a meal.

The burden to show this is upon the hotelkeeper.

A hotelkeeper may serve liquor to a transient guest on Sunday, but the situation must be such as to indicate to a person of ordinary intelligence that the guest resorted to the hotel to obtain a meal in good faith and that the liquor was ordered as an incident to the meal and not that the object was to obtain liquor by ordering some article of food to accomplish that purpose.

When it appears that the defendant sold liquor on Sunday in a room annexed to the bar to persons who came and went, and that the only meals served consisted of sandwiches, served on a plate without knives or forks or any of the usual accessories of a meal, a finding that the defendant was actually serving guests with meals as distinguished from supplying customers with liquor cannot be sustained.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the petitioner, Maynard N. Clement, as State Commissioner of Excise, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of September, 1906, denying the petitioner's motion to revoke and cancel liquor tax certificate No. 5,411, theretofore issued to Henrietta Martin, and also from a judgment for costs entered in said clerk's office on the 29th day of September, 1906.

Herbert H. Kellogg, for the appellant.

P. A. McManus, for the respondent.

INGRAHAM, J.:

This was a proceeding instituted by the State Commissioner of Excise to revoke a liquor tax certificate based upon a violation of the Liquor Tax Law by selling liquor on Sundays. The defendant interposed an answer to the petition, alleging that she was the keeper of a hotel and that the sales on Sunday were made at the time mentioned in the petition to guests of the hotel upon said premises, with meals, and not in the barroom, or other similar room. Upon the petition and answer a referee was appointed to take proof, and upon the evidence taken before the referee the motion was denied and the proceedings dismissed.

It appeared that special agents of the Excise Department went to the defendant's place of business, 299 Seventh avenue, in the city of New York, on June 10, 1906, and entered a sitting room at the rear of the barroom, which was furnished with tables; that two of these special agents ordered whisky and the others beer, which orders were served by the defendant and consumed on the premises; that the agents then paid for what they had received; that there were about fifteen people sitting at tables in the room, ordering and being served with drinks; that this room was connected with the street, the door to which was open, and was connected with the barroom by a narrow passage. These special agents testified that they neither ordered nor were served with any food at the time they ordered the drinks, but that there were some scraps of bread on a plate on the table; that neither of the agents partook of any of these scraps of bread, but that they were left on the table in the same condition as when the agents entered the room; that there were about nine tables in the room at which there were a number of people sitting; that there were none of the usual appliances of a restaurant or eating-house; there were no knives or forks, but each table had a plate on it with some kind of food on each plate; that at the table at which the special agents sat and were served with drinks there was but one plate.

The application for a liquor tax certificate was then introduced in evidence in which the applicant stated that the business to be carried on in connection with the liquor business was that of a hotel; that such hotel conformed to the laws, ordinances, rules and regulations relating to hotels and hotelkeepers and contained at

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least ten bedrooms above the basement, exclusive of those occupied by the family and servants, and was properly furnished to accommodate lodgers. Upon this application a liquor tax certificate was issued to the applicant.

There was also evidence that on the 17th of June, 1906, special agents of the Excise Department went to these premises into the sitting room, by the side entrance, took a seat at a table and when the waiter came to them ordered whisky; the waiter then asked them what they would have to eat, to which the agents replied, "nothing;" the waiter then told them they would have to order something, whereupon one of the agents told the waiter to bring in anything; the waiter then brought four glasses of whisky, four glasses of water, and four sandwiches on four plates, for which the agents paid seventy cents for the whisky and twenty cents for the sandwiches; that none of the agents partook of any of the sandwiches, and they were left on the table where the waiter placed them, in the same condition as they were when served; that other people were in the room, being served with whisky or beer; that there were none of the usual appliances for a meal on any of the tables; that people were coming and going all the time, and the witnesses saw no meals being served at any of these tables. The petitioner then admitted that the premises No. 299 Seventh avenue complied with the requirements of the Liquor Tax Law in respect to hotels.

On behalf of the defendant there was testimony to the effect that these special agents came into her place of business on June 10, 1906, sat down at a table and ordered four sandwiches, two whiskies and two beers and paid the bill to the waiter; that they were told they would have to order sandwiches in order to get anything to drink, and the sandwiches were brought to them before the liquor; that on June 17, 1906, the four agents entered the hotel and asked the waiter to bring them four sandwiches and that they then ordered four drinks of whisky. The waiter who served these special agents on June tenth testified that the men came into the room and asked for four corned beef sandwiches; that they then ordered two whiskies and two glasses of beer; that he charged them twenty cents for the sandwiches and thirty-five cents for the drinks; that afterwards they ordered four ten-cent cigars, which were also furnished. The same witness testified that on June

seventeenth the four agents again entered the room and asked the witness what he had to eat; that they ordered four corned beef sandwiches, which were served, and then ordered four whiskies; both the sandwiches and liquor they paid for.

The sale of liquor on Sunday being conceded, the only question was whether the sale was allowed by section 31 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1903, chap. 486). That section provides that "It shall not be lawful for any person, whether having paid such tax or not, to sell, offer or expose for sale, or give away any liquor: a. On Sunday; or before five o'clock in the morning on Monday. * * * The holder of a liquor tax certificate under subdivision one of section eleven of this act who is the keeper of a hotel, may sell liquor to the guests of such hotel, * * * with their meals, or in their rooms therein * * *; and the term 'hotel' as used in this act shall mean a building regularly used and kept open as such for the feeding and lodging of guests, where all who conduct themselves properly and who are able and ready to pay for their entertainment, are received if there be accommodations for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied, at a reasonable charge, with their meals, lodgings, refreshment and such service and attention as are necessarily incident to the use of the place as a temporary home, and in which the only other dwellers shall be the family and servants of the hotel keeper. * * * A guest of a hotel, within the meaning of this exception to section thirty-one of this act, is: 1. A person who in good faith occupies a room in a hotel * * *; or, 2. A person who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in good faith, a meal therein."

To justify a holder of a liquor tax certificate, therefore, in selling liquor on Sunday, it must appear that the person to whom the liquor was sold was one who, in good faith, occupied a room in the hotel, or a person who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in good faith, a meal therein. It is settled that when it is established that liquor was sold upon

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Sunday by a person holding a liquor tax certificate, the holder of the certificate must establish that the person furnished with liquor is a guest of the hotel. (*People v. Crotty*, 22 App. Div. 77; *Cullinan v. O'Connor*, 100 id. 142.) It must, therefore, appear that the person to whom the liquor was sold was a person who, "during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in good faith, a meal therein."

The testimony of the defendant does not make these persons to whom the liquor was served on June tenth and seventeenth guests of the hotel within this provision of the statute. There was no evidence that at the time these persons were served "meals (were) regularly served" in this place, or that these persons went to this place for the purpose of obtaining, in good faith, a meal. While the defendant was justified in acting upon appearances, and if, from the surrounding circumstances, the person to whom this liquor was served apparently in good faith ordered a meal, and with it, and as a part of the meal, the liquor that was furnished, the defendant would be within the exception provided for by this section of the statute. The question in each case is one of fact to be determined upon the evidence. In this case none of the usual accessories with which meals are served were in use, and there was nothing to indicate that meals were being served to the guests of the hotel.

It is quite impossible to lay down any hard and fast rule as to what shall constitute a meal. As was said in *Matter of Cullinan, Young Certificate* (93 App. Div. 427): "There can be no reasonable doubt that under some circumstances a sandwich and a drink of whisky or other beverage constitute a meal. * * * We apprehend, under the liberal construction to which a revenue measure is entitled, and considering the forfeiture which is worked by a violation of the provisions of the statute, that it is not the duty of the respondent to inquire diligently into the motives which actuate those who frequent his premises. He has a right, in the absence of knowledge to the contrary, to assume that one who comes into his place and orders a sandwich or any other article of food, does so because he desires the nourishment which it affords, and if a single sandwich satisfies the desires of the person, it constitutes a meal, and the keeper of a hotel has the right to serve liquors to him with such

meal." In *Cullinan v. O'Connor* (100 App. Div. 142) it was said: "The statute and the decisions thereunder make it apparent that in order to be a guest through service of a meal and to confer upon the hotelkeeper the privilege of selling liquor upon Sunday, a person must resort to a place for the primary purpose of obtaining in good faith a meal. This purpose, when effectuated by the service upon the part of the hotelkeeper of such meal, draws with it as an incidental and secondary matter the right to procure and serve liquor. It is so well established as to be elementary in this connection that the primary purpose of going to a hotel must not be to obtain liquor, and that such purpose will not serve as a protection to the hotelkeeper for his Sunday sales, no matter how colored, disguised or concealed, provided only the courts can detect the real object and distinguish the misrepresentation of the devices which are employed in the attempt to cloak and cover it."

But to justify the proprietor of a hotel in furnishing to a transient guest liquor upon Sunday, the situation must be such as to indicate to a person of ordinary intelligence that the guest had resorted to the establishment to obtain, in good faith, a meal, and that the liquor he ordered was an incident to that meal; not that the object was to obtain liquor, ordering some article of food which was not consumed to accomplish that purpose. It is the obtaining of the meal in good faith which authorizes the hotelkeeper, as a part of that meal, to furnish liquor, and not the ordering of a small portion of food for the purpose of so coloring the transaction that the liquor can be obtained without the meal. Thus the statute expressly requires that to constitute a person a guest it must appear that he resorted to the hotel for the purpose of obtaining a meal during the hours when meals were regularly served therein, and "actually orders and obtains at such time, in good faith, a meal therein." The statute thus requires good faith on the part of the person who is served in a hotel with liquor on Sunday, and the circumstances must be such that the hotelkeeper is justified in assuming that a person resorting to his establishment does so for the purpose of obtaining, in good faith, a meal. Merely supplying an article of food with the liquor that is ordered, standing alone, does not justify the hotelkeeper in furnishing liquor. We think it conclusively appears in this case, from the circumstances surrounding the whole

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transaction and the absence of evidence that, at the time this liquor was furnished, the hotel was actually serving its guests with meals, as distinguished from supplying its customers with liquor, that the finding of the Special Term that the defendant was authorized on these days to supply persons frequenting the place with liquor cannot be sustained.

It follows, therefore, that the judgment and order appealed from must be reversed, with ten dollars costs and disbursements, and the motion to revoke the liquor tax certificate granted, with ten dollars costs.

PATTERSON, P. J., CLARKE and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

I agree with Mr. Justice INGRAHAM in his construction of the law, but I think the evidence fairly sustains the finding that the law was not violated, and that, therefore, the order should be affirmed.

With respect to the alleged violation of the tenth day of June, the respondent showed by six witnesses, three of whom appear to have been disinterested, that the special agents first ordered sandwiches, and were served with the sandwiches before they were served with the drinks. Where a party who has not a room in the hotel enters the eating room of a hotel on Sunday and first asks for food, and in connection with it asks for liquid refreshments, I think the proprietor, in the absence of other evidence of the purpose of the visit, is justified in assuming that the primary purpose is to obtain something to eat. Since it has been decided that a sandwich may constitute a meal, I think it is immaterial that the sandwich, after having been ordered first, is not eaten. It is not improbable that a man may think he has an appetite, and find when the food is placed before him that he has not; that cannot affect his original order for food upon which the proprietor was justified in acting.

With respect to the alleged violation on the seventeenth day of June, the respondent showed by five witnesses that the special agents first asked for four sandwiches, and that the sandwiches were served before the drinks were brought to the table.

I am of opinion also that the fair inference is that the room in

which the sandwiches and drinks were served was the regular dining room of the hotel. The concession that the premises conformed to the law with respect to the requirements of a hotel was a concession that there was such a dining room properly equipped with suitable tables, furniture and accommodations, and kitchen conveniences for cooking. (Liquor Tax Law [Laws of 1896, chap. 112] § 31, subd. 2, as amd. by Laws of 1903, chap. 486.) I think the respondent, in view of this concession, was led to believe that the concession was with respect to this particular room as the dining room, and that she was justified in believing that the issue to be tried was whether drinks were served without a meal, and to that point alone the further evidence was addressed. The statute does not assume to prescribe the hours during which meals may be served in a hotel.

Another fact which tends to show that it is improbable that the law was violated on these occasions is that the special agents were recognized as such by the employees of the respondent before their orders were taken. No hotel proprietor will be secure in his liquor tax certificate unless his right thereto may be sustained on the testimony of his employees, corroborated in a manner to satisfy the conscience of the court, that the complainants on entering the dining room manifested that their primary purpose was to obtain food by first ordering something to eat.

Judgment and order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

THE NATIONAL CITY BANK OF NEW YORK, Respondent, v. PACIFIC COMPANY, Appellant.

First Department, January 11, 1907.

Bank — when bank entitled to recover costs of foreign exchange — evidence — defendant who has made plaintiff's agent his witness cannot introduce written evidence to contradict him.

When the defendant on cross-examination has made the plaintiff's agent his own witness by introducing in evidence a letter of the agent, the defendant's letter in answer thereto is incompetent.

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The defendant employed the plaintiff to transmit a sum of money in Peruvian currency to Peru by cable, which was done by the plaintiff acting through London bankers, who were paid a premium therefor. The defendant admitted the transaction and that certain expenses were paid by the plaintiff for commissions and disbursements as alleged in the complaint, but as a defense alleged that the moneys were not expended at the request of the defendant, or for its benefit.

Held, that the plaintiff was entitled to a direction of verdict, no defense being stated, in the absence of an allegation that the disbursement was not a necessary and proper one for the purpose of remitting the money to Peru, or of bad faith upon the part of the plaintiff;

That the allegation that the payment was not made at the request of or for the benefit of the defendant was a mere conclusion which did not present an issue.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the defendant, the Pacific Company, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 2d day of May, 1906, granting the plaintiff's motion to set aside the verdict of a jury in favor of the defendant and granting a new trial of the action.

Francis G. Caffey, for the appellant.

John A. Garver, for the respondent.

INGRAHAM, J.:

This action was brought to recover the sum of \$912.35 expended by the plaintiff at the request of the defendant in transmitting a sum of money from New York to Lima, Peru, by cable. The question in dispute was the amount of a premium paid by the plaintiff to a London bank for transmitting the money, amounting to \$1,829.06. The defendant paid to the plaintiff the sum of \$50,000, the plaintiff claiming that the cost of the transaction, including its commissions, was \$50,912.35, which included the disputed charge.

The complaint alleges that "on November 22, 1904, the defendant requested the plaintiff to transfer by cable to one Di Fomento, at Lima, Peru, the sum of Ten Thousand Peruvian pounds, in Peruvian money, and to effect such transfer by the following morning; that the plaintiff duly made said transfer through the London City & Midland Bank of London, England, which was a proper method of

effecting the said transfer, and paid the said bank therefor \$50,644.48; that the plaintiff expended \$24 for cable messages in connection with the said transaction, and its commission amounted to \$243.87, making the total amount laid out and expended, in effecting the said transfer, including the plaintiff's commission, \$50,912.35, of which the defendant has paid only \$50,000, leaving a balance of \$912.35."

The answer admits that on November 22, 1904, the defendant requested the plaintiff to transfer the money by cable as alleged in the complaint; that the plaintiff effected the transfer and the payment of 10,000 Peruvian pounds to the said Minister Di Fomento at Lima, Peru, through the London City and Midland Bank of London, Eng., and paid to said London bank therefor \$50,644.48; that the plaintiff expended \$24 for cable messages in connection with the said transaction, and that the plaintiff's commission amounted to \$243.87, making the total amount laid out and expended in effecting the said transfer, including the plaintiff's commission, \$50,912.35; that the defendant has paid to the plaintiff only \$50,000; that the sums of \$24 for cable messages, and \$48,815.42 were paid out and expended by the plaintiff at the request of defendant, and alleges that "the defendant did not request any part thereof to be paid to said London bank, the plaintiff having itself chosen said London bank as a medium for effecting said transfer to said Minister Di Fomento, and in effecting said transfer having paid out \$1,829.06 improperly and without request from the defendant." The answer further alleges that the plaintiff "laid out and expended \$1,829.06 without the request of and without benefit to the defendant." The answer then alleges payment, and these facts are again alleged by way of counterclaim, the defendant seeking to recover from the plaintiff the balance of \$50,000 paid by defendant to the plaintiff after deducting the amount of the plaintiff's account, less the alleged improper charge of \$1,829.06.

The answer, therefore, expressly admits the employment of the plaintiff by the defendant to effect this transfer of money to Peru, and that in so effecting this transfer the plaintiff actually paid out this sum of \$1,829.06; then alleges that this sum of \$1,829.06 paid out by the plaintiff to the correspondent to effect the transfer of

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the money to Peru was paid without the request of and was, therefore, not binding upon the defendant.

The plaintiff called the head of its foreign exchange department as a witness, and upon cross-examination by the defendant he testified that the president of the defendant called upon him on the 22d of November, 1904; that he told defendant's president "about a premium or other charge having to be paid in London" in making this transmission; that the defendant would probably have to pay a premium on it, seeing that a specific kind of currency was required to be paid into the Ministry of Foreign Affairs in Lima and had to be paid the next morning; that a premium would have to be paid in London; that there was a "decided difference between a transfer by cable and any other transfer; on a transfer by cable the money is paid here in New York to-day and probably paid out as fast as the cable can reach the other point in Peru." He testified that this transfer was ordered in the afternoon and was to be paid out at Lima the next morning before twelve o'clock; that if the transfer had been made by mail it would have taken from four to five weeks before the concern in Peru would have got the money, and "the difference between the telegraphic transfer and the mail remittance is taken into account as the premium. The premium is computed on the basis of the shipment of that amount of money in actual money, freight, insurance, loss in time while in transit," etc.; that a cable transfer is simply transferring the credit from one to the other, but that all has to be paid for; that the president of the defendant instructed the plaintiff to go ahead and make the transfer.

The defendant then offered in evidence a letter of the witness to the defendant's president which called the defendant's president's attention to the fact that defendant might have to pay a premium, and that defendant's president informed the writer of the letter that it was thoroughly understood by the defendant and to go ahead with the matter. This was on the cross-examination of the plaintiff's witness, the defendant making him its witness for this purpose. The defendant having introduced a letter of the plaintiff's agent to the defendant's president, then offered in evidence the reply of its president which contained his account of the agreement. This was objected to by the plaintiff, which objection was overruled and the plaintiff excepted.

It is quite clear that this letter was incompetent. It was not answered nor did it seem to call for an answer; it contradicted the terms of the agreement as stated in the letter introduced by the defendant under which the plaintiff acted, and could have been of no relevancy except as a declaration of the defendant's president as to his understanding of the agreement. If the plaintiff had introduced this letter to the defendant in evidence, then, of course, the defendant would have been entitled to prove the reply; but the defendant having proved plaintiff's agent's letter against the objection of the plaintiff, could not make the reply competent as against the plaintiff. The admission of this letter being error, the court below was justified in setting aside the verdict.

Under the pleadings, however, I think there was no question for the jury and that the plaintiff was entitled to the direction of a verdict. The complaint alleges that on the 22d of November, 1904, the defendant requested the plaintiff to transfer by cable to Peru the sum of 10,000 Peruvian pounds. The answer admits this allegation. The complaint then alleges that the plaintiff made the said transfer through the London City and Midland Bank of London and paid the said bank therefor \$50,644.48. That allegation is also admitted in the answer, coupled with an allegation that the plaintiff laid out and expended \$1,829.06 without the request of and without benefit to the defendant. The plaintiff thus having alleged and the defendant admitted the request to make the remittance, and the plaintiff having actually made the remittance as requested and paid therefor the cost of making such remittance, the plaintiff was entitled to be repaid the cost of making this transfer unless there was evidence of bad faith. The plaintiff was employed to effect such transfer of money and actually and in good faith paid the necessary disbursements to accomplish the transfer, and it is, therefore, entitled to repayment for the disbursements incurred. There is no allegation in the answer that this disbursement was not a necessary and proper one for the purpose of remitting the money to Peru. The allegation in the answer that the payment was not made at the request of and for the benefit of the defendant is the allegation of a conclusion and does not present an issue as to the good faith of the plaintiff in making the payment to the London bank as the charge incurred by it for making the remittance.

The testimony of the plaintiff's employee that he told the defendant that it would probably have to pay a premium for remitting this sum and that the remittance would be made through the plaintiff's London correspondents, which was not contradicted by the defendant's president in his testimony, justified the plaintiff in making the transfer through London and made the defendant liable for the necessary charges paid by the plaintiff in London for transmitting this money to Peru.

At the end of all the testimony the plaintiff moved for the direction of a verdict in its favor on the ground that the allegations of the complaint having been admitted and proved without controversy, the plaintiff was entitled to a verdict. This motion was denied and the plaintiff excepted. I think this motion should have been granted, and for that reason the court was justified in setting aside the verdict. There was clearly no question here to be submitted to the jury. The court seems to have left a question of law for the jury's determination, who found a verdict for the defendant which was not justified by the pleadings or the evidence.

It follows that the order appealed from should be affirmed, with costs.

PATTERSON, P. J., CLARKE and SCOTT, JJ., concurred ; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

I am of opinion that the learned trial justice erred in setting aside the verdict. According to his memorandum opinion this was done upon the theory that all of the material allegations of the complaint were admitted by the answer, and that, therefore, he erred in admitting evidence of separate defenses setting forth a different contract from that alleged in the complaint and admitted. The rule that an affirmative defense, setting up a contract inconsistent with the contract alleged in the complaint and admitted by the answer, does not present an issue, is well settled (*Fleischmann v. Stern*, 90 N. Y. 110), but I think it has no application to the case at bar. Here the plaintiff alleges that on the 22d day of November, 1904, it was requested by the defendant to transfer by

cable to an individual at Lima, Peru, the sum of 10,000 Peruvian pounds in Peruvian money by the following morning; that plaintiff duly made the transfer through a London bank, its correspondent, "which was a proper method of effecting the said transfer," and paid the bank therefor the sum of \$50,644.48 and expended \$24 for cable messages, and that its commissions amounted to \$243.87, "making the total amount laid out and expended in effecting the said transfer, including the plaintiff's commission, \$50,912.35, of which the defendant has paid only \$50,000, leaving a balance of \$912.35," for which judgment was demanded. The answer admits the employment; that plaintiff laid out and expended in making the transfer the amount specified in the complaint, the charge for cable messages and for commissions, and also admits that all of the amounts so paid out, excepting the sum of \$1,829.06, was paid and expended by the plaintiff at the request of and for the benefit of the defendant, but denies that the defendant requested that plaintiff transmit the money through the London bank, and alleges that in effecting the transfer the defendant selected the London bank as a medium and paid out the sum of \$1,829.06 of the total amount alleged to have been expended improperly and without the request of the defendant, and denies that it has any knowledge or information sufficient to form a belief as to whether making the transfer through the London bank was a proper method of effecting the same, and denies that there is any balance owing to the plaintiff. The plaintiff neither alleges that the amount expended by it in making the transfer was necessarily expended, nor that it was expended at the request of the defendant. In this regard I think the complaint was defective, but that is not the question now before us for adjudication. It was essential to the plaintiff's right to recover that it show either of these facts. If the plaintiff had merely alleged that it expended \$5,000,000 in making the transfer, I presume it would not be seriously contended that because the defendant ascertained that this was true, and, therefore, was obliged to admit it, that plaintiff would be entitled to recover that amount without showing necessity or authority for such expenditure. The amount of the expenditure does not affect the principle, and the admissions and denials in the defendant's answer and the allegations of fact in connection therewith, were clearly designed to

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present the issue as to whether this expenditure of \$1,829.06 to the London bank was necessary or authorized. The further allegations in the separate defense were designed to present the same issue. The answer alleges, as a separate defense, that the defendant expended the sum of \$1,829.06 without the request of the defendant and without benefit to it, and that the plaintiff had been fully paid for the services rendered. It also set up by way of counterclaim that the plaintiff only paid and expended at the request of the defendant the sum of \$48,839.42, which leaves the sum of \$916.71 due and owing to the defendant of its deposit of \$50,000, after deducting the cable charges and plaintiff's commissions, for which amount judgment is demanded. The plaintiff recognized that the answer put in issue the question of the necessity of or authority for the expenditure of \$1,829.06, by its reply, in which it denies that it did not expend more than \$48,839.42 at the request of or for the benefit of the defendant, and by assuming the affirmative of that issue upon the trial. The case was tried upon the theory that the pleadings presented this issue.

The plaintiff called an employee who was at the head of its foreign exchange department and transacted this business. He testified that transferring the money through the London bank was a usual method of effecting a transfer and that the plaintiff could not make a direct transfer. The witness testified that the item of \$1,829.06, which was in dispute, consisted of a charge of three and three-fourths per cent premium by the London bank. He admitted that Mr. Scott, who represented the defendant, had come to him representing the plaintiff, through an introduction by a mutual friend; that Scott told him what others would charge for making the transfer and that he informed Scott that the plaintiff would do it as cheap as any other bank, but he testified that he told Scott that he thought he would have to pay a premium in London, owing to the fact that a specific kind of currency was required to be paid in Peru, but that he was not certain about that, and that Scott replied to go ahead and the defendant would take chances on it. A letter written by this witness to Mr. Scott, the president of the defendant, after the latter objected to this charge, shows that he was informed by the plaintiff's London correspondent by a letter which he quoted, that the charge was made owing to the fact that

on that day the Peruvian pound was at three and three-fourths per cent premium in Peru, and that in order to make the payment in Peruvian pounds, in accordance with the defendant's wishes, it was necessary to pay that premium in London. Mr. Scott testified positively that it was distinctly understood between him and the plaintiff's representative, that it was immaterial to the defendant whether the money was sent through London or direct, provided it would be sent by the plaintiff at the same rate at which others who could make direct transmission, had offered to transmit it, which was one-half of one per cent and the cable charges, to which plaintiff's representative agreed. He also testified that it was suggested that there might be a premium on Peruvian gold in Lima on that day and that he told the plaintiff's representative that there never had been such a thing, but that if there should be, the defendant would pay it. This witness testified that he was familiar with the money markets of the world; that he never knew of the Peruvian pound being at a premium in Peru. The testimony of Mr. Scott, the president of the defendant, was corroborated by that of the treasurer of the defendant. A member of the Lima bar, called as a witness for the defendant, testified that he was formerly minister from Peru to this country; that the English pound sterling and the Peruvian libra or pound were interchangeable at par and that this condition had existed continuously since the establishment of the gold standard in the year 1896 or 1897.

I am of opinion that this evidence presented a fair question of fact for the jury and that their verdict in favor of the defendant should not have been disturbed. According to the testimony introduced in behalf of the defendant, which I think preponderated, the jury were justified in finding that other banks having direct lines of transmission to Peru had offered to transmit this money without any charge, except their commissions and the cable expenses; that the defendant took the business to the plaintiff as a matter of friendship and that plaintiff agreed to transmit the money upon the same basis, with the suggestion merely that if there was a premium on the Peruvian pound in Lima, there would be a premium charge in London, which the defendant agreed to pay; that there was no premium on the Peruvian pound in Lima on that day and that this premium charge by plaintiff's London correspondent was based on

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an erroneous theory and claim that there was, and that it was, therefore, an unnecessary and unauthorized expense, not properly chargeable to the defendant. For these reasons I am of opinion that the order should be reversed and the verdict reinstated.

Order affirmed, with costs. Order filed.

MARK M. NICHOLLS, Appellant, v. AMERICAN STEEL AND WIRE COMPANY, Respondent.

First Department, January 11, 1907.

Sale — contract as to shipment of goods construed — measure of damages for failure to deliver — practice — when Appellate Division may direct judgment for plaintiff on special verdict.

In an action for the breach of a contract to deliver goods to be manufactured by the defendant for the plaintiff it appeared that the contract provided that the defendant was to sell four hundred barrels of the goods at the rate of six to eight barrels per week, the entire quantity to be taken prior to a fixed date. The above portion of the contract was typewritten, and annexed thereto was a printed specification headed "remarks" wherein it was provided that the purchaser should give the seller specifications for goods covering shipments not less than ten days before the time of shipment.

Held, that under said contract defendant was required to ship to plaintiff at least six barrels per week, and that a failure to do so was a breach of the contract; That the printed remarks at the end of the contract referred only to cases where the provisions of the contract contained no specific obligation as to shipment; That as the defendant's failure to deliver the goods was shown to have obliged the plaintiff to close its manufacturing plant, the plaintiff was entitled to recover as damage the loss of rent and interest on the capital invested in the factory;

Held, further, that where the court has taken a special verdict which is rendered in favor of the plaintiff and then dismisses the complaint, and there are no exceptions taken by the defendant which would justify the Appellate Division in ordering a new trial, the Appellate Division on reversing the order dismissing the complaint should direct judgment for the plaintiff on the special verdict.

CLARKE and SCOTT, JJ., dissented.

APPEAL by the plaintiff, Mark M. Nicholls, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of February, 1905, upon the dismissal of the complaint by direction of the

court after a trial at the New York Trial Term, a special verdict in favor of the plaintiff having been previously rendered by a jury.

George T. Hogg, for the appellant.

Joseph P. Cotton, Jr., and *George H. Bartholomew*, for the respondent.

INGRAHAM, J. :

The action was to recover the damages sustained by the plaintiff in consequence of a breach of a contract for the sale and delivery of galvanized broom wire. By the contract, a copy of which is annexed to the complaint, the defendant sold to the plaintiff 400 barrels No. 21 galvanized broom wire, "Shipments to commence upon completion of present contract; to be made at the rate of 6 to 8 barrels per week, the entire quantity to be taken prior to June 1st, 1902. * * * Each month's shipment to be treated as a separate and independent contract. * * * Strikes, differences with workmen, accidents to machinery and other contingencies beyond the control of the seller to be sufficient excuse for any delay in shipment traceable to such cause." It is alleged that the prior contract was completed August 2, 1901, and that the defendant failed to deliver to the plaintiff during the weeks ending August 9, 16, 23, 30, September 6, 13, 20 and 27, 1901, six to eight barrels in each week—in all forty-eight to sixty-four barrels of wire, but delivered only during all of said weeks six barrels of wire, two of which were delivered on August 30, 1901, and the remaining four barrels on September 10, 1901, and utterly failed to deliver the balance of said forty-two to fifty-eight barrels of wire; that "by reason of defendant's failure to deliver to plaintiff said regular weekly shipments of wire as provided in said contract * * * plaintiff was unable to continue his manufacture of flexible tubing, and was compelled to stop the operations of his factory, and was unable to fill the orders of his customers, and by reason of the premises and defendant's failure to deliver as aforesaid suffered damages in the sum of Nine thousand seven hundred and fifty dollars (\$9,750.00)."

The answer admitted the making of the contract and that the prior contract was completed on August 2, 1901. It denied the allegations as to the delivery of the wire and alleged that it delivered

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to the plaintiff two barrels of wire on August twenty-second, four barrels on August thirty-first, six barrels on September twentieth and six barrels on September twenty-fifth, and made other shipments under the contract, and as a separate defense alleged that it was understood between the parties that the plaintiff was to notify the defendant, from time to time, of the amount of wire it desired to be shipped; that the plaintiff did not notify the defendant that it desired any shipments to be made under the said agreement, otherwise than as such shipments were made by the defendant as particularly set forth, and that the defendant duly complied with the terms of the said agreement and made shipments of the wire therein mentioned as specified by the plaintiff.

The plaintiff testified that at the time the prior contract of October 5, 1900, was about completed, he went to the defendant's place of business at Cleveland, O., and saw the defendant's representative; that he asked the defendant's representative if the defendant would pay attention "and ship me the wire on the new contract without any intermission whatever. He said he would;" that at that time there were six barrels more to be shipped on the old contract, and that was immediately shipped; that there was no place in the market to get No. 21 galvanized wire, except from the defendant; that it had to be made for the plaintiff, otherwise he could not get it; that the defendant's agent was taken over the plaintiff's factory and shown the plant and was told that the plaintiff could not do anything without the wire; that when the contract of June, 1901, was made the plaintiff told the defendant's agent that the plaintiff wanted a stated amount in the contract as to what was to be shipped by weekly shipments; that he expected to be very busy; that they had contracts to be delivered a little later, in September and October, one for 750,000 feet of tubing to be delivered before January, 1902, and specified other orders that he had; that the plaintiff had lost his trade, as he could not fill the orders. There was other proof tending to show that, in consequence of the failure of the defendant to deliver the wires as required by the contract at the rate of from six to eight barrels per week, the plaintiff was unable to manufacture the tubing. Subsequently the court, upon motion of the defendant, struck out the evidence relating to the plaintiff's business and the order that he had when the con-

tract was executed. The plaintiff then proved the rent paid for his factory, with his investment in the business; and testified that during the month of August he got six barrels of wire from the defendant, and got no wire during the month of September; that in consequence of the failure of the defendant to deliver the wire as called for by the contract, he was compelled to suspend his business and shut down his factory during the months of August and September.

The defendant's representative who made this contract on June 12, 1901, was called as a witness for defendant. He denied the testimony of the plaintiff as to the conversation at the time the contract was made and testified that the plaintiff told him that he could not put in any exact specifications as to the quantity to be shipped each week, but would let the defendant know about it later; that he called at the plaintiff's place of business about the twenty-fifth of June, when the plaintiff said that he was not ready to place the shipping order and would let defendant know about further shipments; that about August nineteenth he received an order for six barrels of wire to be shipped at once, but that the plaintiff's representative would give no standing order for shipments. The letter from the plaintiff to the defendant of August 20, 1901, asking why the defendant had not shipped the plaintiff any wire under the contract, with the reply of the defendant on August 24, 1901, simply stating that two barrels had been shipped and the balance would follow promptly, rather sustained the plaintiff's version of the understanding at the time this contract was made. If there had been any such understanding as testified to by the defendant's witnesses the defendant in answer to that inquiry would have stated that as they were not to ship wire until ordered, and no order having been given, no wire had been shipped.

The court submitted specific questions of fact to the jury, the first being: "Did the plaintiff or his son, as his authorized representative, at some interview or interviews, during the month of August, 1901, state to any agent or agents of the defendant that specifications or orders or directions as to shipments desired by plaintiff under the contract of June the 12th, 1901, would thereafter be sent or furnished to the defendant?" To this question the jury answered "No;" and that answer, being sustained by the evidence, I think justified a verdict for the plaintiff.

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The defendant claims that under this contract they were only bound to furnish the wire as specifically ordered by the plaintiff. The typewritten portion of the contract, setting forth the understandings, provided that the plaintiff purchased and agreed to receive from the American Steel and Wire Company and the said American Steel and Wire Company agreed to sell to the plaintiff 400 barrels No. 21 galvanized broom wire to be made at the rate of six to eight barrels per week, the entire quantity to be taken prior to June 1, 1902. Annexed to this contract were printed specifications headed "Remarks," and one of these was: "The purchaser shall give to the seller specifications for goods covering shipments, not less than ten days before time of shipment." The claim of the defendant is that this printed provision qualifies the obligation to ship weekly, so that the obligation of the defendant for the weekly shipments only commenced upon the date of the notification by the plaintiff. It will be noticed that the total amount sold was 400 barrels, and of these it was provided that six to eight barrels should be shipped weekly. The express provision as to shipments in the contract would be a specification by the purchaser as to shipments of eight to ten barrels per week. Assuming that eight barrels per week were shipped for the balance of the year, from August second to the first of the following June, there would be a considerable amount in addition that the plaintiff was bound to take before the first of June, to make up the 400 barrels sold, and undoubtedly under this provision, before the plaintiff could place the defendant in default for the additional amount, he would have to give the defendant direction as to shipments. There can be no doubt that if the defendant had gone on shipping to the plaintiff six to eight barrels per week, the plaintiff would have been bound to receive them, even though he had not ordered them. So, I think, the defendant was required under the contract to ship to the plaintiff at least six barrels of wire per week, and a failure to ship this wire was a breach of the contract. The obligation to ship from six to eight barrels per week was absolute, and the printed "remarks" at the end of the contract would only refer to a case where the provision of the contract contained no specific obligation as to the shipments, for where the contract expressly provided when the defendant was to ship the wire sold no further directions were required. The

defendant gave testimony tending to show that after the time at which these shipments were to commence the plaintiff, in substance, requested a delay of the shipment, and that the defendant, acting on that request, had suspended shipments until it received directions from the plaintiff. If this was true, it would justify the defendant in suspending shipments and estop the plaintiff from claiming that such a failure to ship was a breach of the contract; but the jury has found against the defendant upon this question, and their verdict is controlling. Upon the finding of the jury upon this question submitted to them, therefore, I think, the plaintiff was entitled to a verdict for the damages that he sustained in consequence of the failure of the defendant to deliver the wire as provided for by the contract.

The next question relates to the measure of damages. The plaintiff sought to recover from the defendant the profits upon contracts that it had lost in consequence of his failure to procure the wire which was necessary for the completion of the contracts. The court ruled that the plaintiff could not recover for any loss of profits upon these contracts, and as the plaintiff does not complain of this ruling, it is not necessary to consider the question as to whether this item of damages was proper. The plaintiff, however, alleged in addition to the damages in relation to the contracts with its customers, that by reason of the defendant's failure to deliver to the plaintiff the weekly shipments of wire as provided for in said contract, he was unable to continue his manufacture of flexible tubing, and was compelled to stop the operations of his factory; and the court submitted to the jury the question as to whether the plaintiff was obliged to suspend the operation of its factory for some weeks by reason of the fact that he did not receive delivery of the wire from the defendant, and whether the plaintiff sustained damage by reason of such suspension of the operation of the factory, to which they answered, yes, the jury found that the plaintiff had sustained damages for loss of rent of \$624.99 and six per cent interest on the capital invested in this factory of \$172.50, making a total of \$749.49.

This finding was sustained by the evidence, and it seems to me that the profits of the business being eliminated, as they had been by the ruling of the court, the plaintiff was entitled to recover these items of damages which were the direct loss to him by the suspen-

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sion of his business in consequence of the failure to receive the wire. The evidence showed that if he had been able to continue his business he would have been able to use the building and the machinery in carrying out the contracts for the tubing. By the breach of the contract the plaintiff's business was suspended, and during the period of suspension he was compelled to pay the rent, and lost the interest of the money invested in the factory, and was prevented from making the profits which would usually flow from a successful prosecution of his business. The building and the capital invested were rendered unproductive by reason of the breach by the defendant of the contract, and it seems to me that plaintiff was at least entitled to be repaid this money that he had been compelled to pay for the property which he was unable to use in the prosecution of his business by reason of the breach of the contract by the defendant.

There are no exceptions taken by the defendant in the case which would justify the court in ordering a new trial, and I think that the judgment entered upon the dismissal of the complaint should be reversed and judgment directed for the plaintiff upon the verdict, with costs in this court and in the court below.

PATTERSON, P. J., and LAUGHLIN, J., concurred; CLARKE and SCOTT, JJ., dissented..

Judgment reversed, with costs, and judgment ordered for plaintiff, with costs. Order filed.

EMANUEL J. MYERS and Others, Appellants, v. BERNHARD LEDERER and WILLIAM LEDERER, Respondents, Impleaded with HENRY LICHTENSTEIN and Others, Defendants.

First Department, January 11, 1907.

Pleading — improper joinder of actions to recover value of legal services rendered to several defendants.

When plaintiffs allege that they rendered services as attorneys and counselors at law in and about the formation and organization of a corporation to take over the business of several firms manufacturing in a certain line of business, and allege that they were retained by members of various separate firms who

desired to become parties to the corporation, the actions upon the several and separate contracts of employment cannot be joined in one complaint.

In order that several causes of action may be united it must appear upon the face of the complaint that the causes so united affect all the parties to the action, except as otherwise prescribed by law.

When the severance of such causes of action is required the plaintiff will be granted leave to amend on payment of costs.

APPEAL by the plaintiffs, Emanuel J. Myers and others, from an interlocutory judgment of the Supreme Court in favor of the defendants Lederer, entered in the office of the clerk of the county of New York on the 14th day of September, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the said defendants' demurrer to the amended complaint as improperly uniting several causes of action.

Emanuel J. Myers, for the appellants.

Abraham Gruber, for the respondents.

INGRAHAM, J. :

This action was brought to recover for legal services rendered by the plaintiffs as attorneys and counselors at law. The complaint alleges that prior to the month of April, 1902, at various times mentioned, various persons, some of whom are defendants and some of whom are not, retained the plaintiffs to perform certain professional services in and about the formation and organization of a corporation under the laws of the State of New York to take over the business of the said firms, who were engaged in the manufacture and sale of cloth hats and caps in the city of New York and other firms engaged in the same line of business. The 5th paragraph alleged that in the month of April, 1902, seven of the defendants, who composed the firms of Simonson & Pachner and H. Lichtenstein & Sons, retained and employed the said plaintiffs to render and perform professional services as attorneys and counselors at law in and about the matter of the proposed corporation, and in consideration of the said plaintiffs accepting said retainer and of performing said services in such matter, undertook, promised and agreed to pay the plaintiffs the reasonable value of the services to be rendered therein, and also to pay the reasonable value of the services theretofore rendered as alleged in former paragraphs of the complaint; that there-

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upon and in consideration of such promise the plaintiffs accepted such retainer and entered upon the performance thereof, and the defendants named thereupon promised and agreed to pay the said plaintiffs the reasonable value of the said services performed prior to the month of April, 1902, to all of the persons thereinbefore mentioned and for the reasonable value of the services to be thereafter rendered. There was here alleged a cause of action against the defendants composing the two firms of Simonson & Pachner and H. Lichtenstein & Sons upon an independent contract.

The 6th paragraph alleges that thereafter and in and about the month of April, 1902, two defendants, composing the firm of Simon & Leidersdorf, desiring to become parties to the proposed incorporation and parties to and interested in the said matter, united with the parties mentioned in the 5th paragraph of the complaint, and retained and employed the plaintiffs to render and perform professional services as attorneys and counselors at law in and about the matter of the proposed corporation, and further alleged a promise to pay for the services thereafter rendered, and also for the services alleged to have been rendered by the plaintiffs under the retainers before alleged, and that these defendants also agreed to pay to the plaintiffs the reasonable value of the services rendered prior to the month of April, 1902. There was here alleged a cause of action based upon another contract by which two defendants also agreed to pay for the services performed or to be performed. And the 7th paragraph of the complaint alleged that thereafter, and in and about the month of May, 1902, two defendants, copartners under the name of Seff & Lauterstein, desiring to become parties to the said corporation and parties to and interested in the said matter, united with the parties mentioned in the former paragraphs of the complaint and made with the plaintiffs the same contract as alleged in the 5th and 6th paragraphs of the complaint.

The 8th paragraph of the complaint alleges that in and about the month of July, 1902, two defendants, Bernhard Lederer and William Lederer (the demurring defendants), desiring to become parties to the proposed corporation and parties to and interested in the said matter, united with the parties mentioned in the 5th, 6th and 7th paragraphs of the complaint, and retained and employed the said plaintiffs to render and perform professional services as attorneys

and counselors at law, and made with them the same contract as that alleged in the other paragraphs of the complaint.

The complaint then alleged that the plaintiffs accepted the retainers mentioned in the 5th, 6th, 7th and 8th paragraphs of the complaint, and performed the services required from the month of April, 1902, to July 25, 1902, which services were worth the sum of \$20,000, and seek to recover against all of the defendants jointly a judgment for that amount.

The defendants Lederer demurred to this complaint as improperly uniting several causes of action, and that demurrer was sustained.

It is quite clear that there were here at least four causes of action alleged, based upon separate and several contracts of employment. Each group of defendants who made a joint promise are responsible for the contract that they made, but the defendants who did not join in the contract made by such group are not responsible for that contract. Section 484 of the Code of Civil Procedure provides that in order to unite several causes of action it must appear upon the face of the complaint that all of the causes of action so united, except as otherwise prescribed by law, affect all the parties to the action. This question was presented in *Goldmark v. Magnolia Metal Co.* (30 App. Div. 580). We think there is no doubt but that there were here alleged four separate causes of action based upon four independent contracts, and that all of the defendants were not affected by all of the causes of action alleged, and that, therefore, the demurrer was properly sustained.

The plaintiffs contend that the judgment is erroneous because it requires them to divide this action into four separate actions, and does not give them leave to amend. Section 497 of the Code of Civil Procedure authorizes this judgment, and, therefore, it was not error.

The judgment should be affirmed, with costs, but as the plaintiffs now ask for leave to amend, such leave is granted and plaintiffs may amend the complaint within twenty days upon payment of costs in this court and in the court below.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment affirmed, with costs, with leave to plaintiffs to amend on payment of costs in this court and in the court below. Order filed.

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EMANUEL J. MYERS and Others, Appellants, v. HARRIS SEFF and ISIDOR LAUTERSTEIN, Respondents, Impleaded with HENRY LICHTENSTEIN and Others, Defendants.*

First Department, January 11, 1907.

APPEAL by the plaintiffs, Emanuel J. Myers and others, from an interlocutory judgment of the Supreme Court in favor of the defendants, Harris Seff and Isidor Lauterstein, entered in the office of the clerk of the county of New York on the 4th day of September, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the said defendants' demurrer to the amended complaint on the ground that several causes of action have been improperly united.

Emanuel J. Myers, for the appellants.

Leon Lauterstein, for the respondents.

INGRAHAM, J. :

The question presented in this case is the same as that presented in *Myers v. Lederer* (117 App. Div. 27) decided herewith. For the reasons there stated the judgment appealed from must be affirmed, with costs, with leave to the plaintiffs, however, to serve an amended complaint within twenty days upon payment of costs in this court and in the court below.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment affirmed, with costs, with leave to plaintiffs to amend on payment of costs in this court and in the court below. Order filed.

* See *Myers v. Lederer* (ante, p. 27).

EDWARD BLEWETT and Others, Respondents, v. COLGATE HOYT
Appellant, Impleaded with LEIGH HUNT, Defendant.

First Department, January 11, 1907.

**Practice — when case on appeal should contain grounds of motion to
dismiss the complaint.**

When at trial the plaintiff moves for the direction of a verdict and the defendant moves for the dismissal of the complaint, and in the alternative for a direction of verdict for plaintiff for nominal damages and the court directs judgment for the plaintiff, the case on appeal should state the grounds upon which the defendant moved to dismiss the complaint and for the direction of a verdict, so that there can be no question that he waived any position which he was entitled to take.

APPEAL by the defendant, Colgate Hoyt, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of December, 1906, denying the said defendant's motion to resettle the case on appeal herein.

William D. Guthrie, for the appellant.

George F. Harriman, for the respondents.

INGRAHAM, J.:

The question presented on this appeal is whether the case on appeal should contain the grounds upon which counsel for the defendant Hoyt moved to dismiss the complaint. It seems that after the plaintiff rested, counsel for the defendant Hoyt made a motion to dismiss the complaint, stating at large seven grounds upon which that motion was based. From the stenographer's minutes it appears that he commenced his argument and continued until recess, when the argument was suspended; that after recess counsel for the defendant Hoyt said: "I desire to state that the defendants rest upon the plaintiffs' case." The plaintiffs then made a motion to strike out portions of the testimony, and then made a motion to direct a verdict for the plaintiffs. The court then said: "Now the question is on the motion of the plaintiffs and the defendant Hunt and for the direction of a verdict against the

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defendant Hoyt. Your motion, Mr. Guthrie, is still to dismiss the complaint," to which Mr. Guthrie replied: "My motion is first to dismiss the complaint, in the alternative, a ruling that the plaintiffs in no event are entitled to recover more than nominal damages." The court then, after stating the several motions, said: "I will hear Mr. Guthrie, I think, since he had the floor and has started. Does not this take the question away from the jury, gentlemen? I think it does, and we have quite an important question here." After further discussion the court held that these several motions made a question of law for the court, when the jury seems to have been discharged without objection, and counsel for the defendant continued this motion to dismiss the complaint.

It appears that a long discussion followed, counsel for all of the parties being heard. The court subsequently denied the defendant's motions to dismiss the complaint or to direct a verdict for nominal damages, and granted the motion of the plaintiffs for judgment for the full amount claimed, and subsequently filed a decision in favor of the plaintiffs upon which judgment was entered. The case on appeal as settled merely stated that the plaintiffs moved for the direction of a verdict for the plaintiffs, and counsel for the defendant Hunt joined in that motion, and the defendant Hoyt moved for the direction of a verdict in his favor. There was no statement of the grounds upon which the defendant Hoyt made his motion and which was considered by the trial court. I think this motion should have been granted so that the case should contain a statement of the motion made by the defendant Hoyt and the grounds upon which it was made. On an appeal in a case of this kind it is often important to have the grounds upon which a motion for the dismissal of the complaint or for the direction of a verdict was made, so that there can be no question of a waiver of any position which the defendant was entitled to take. The statement in the affidavits and the stenographer's minutes of what happened upon the trial shows that the defendant Hoyt's motion was upon the grounds stated by him on his motion to dismiss at the close of the plaintiffs' case. It is true that after the motion was made the situation was somewhat changed by the defendant resting; but after the defendant had rested and the plaintiffs had made

their motion for the direction of a verdict, the defendant Hoyt continued his argument of the motion that he had made, based upon the same grounds that he had stated when the motion was to dismiss the complaint at the end of the plaintiff's case. It is only just to the defendant Hoyt that this situation should distinctly appear. The motion to resettle the case was not denied upon a dispute as to what actually happened upon the trial, but from the memorandum of the learned trial judge it would seem to have been based upon the fact that the case in its present condition was settled by consent. No affidavit was submitted by the plaintiffs in opposition to this motion and no question of fact is presented.

The order appealed from should be reversed and the motion to resettle the case granted so that the grounds of the defendant Hoyt's motion to dismiss the complaint should be inserted in the case, with ten dollars costs and disbursements.

PATTERSON, LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted as stated in opinion. Settle order on notice.

EMPIRE TRUST COMPANY, Appellant, v. FRANKLIN R. MAGEE,
Respondent.

First Department, January 11, 1907.

Bills and notes — when action by holder not barred by prior action of third party on same note — when lack of consideration between maker and other party in collateral transaction not available against holder — pleading — failure to repeat allegations in separate defense.

In an action upon a promissory note made by the defendant to his own order and indorsed and delivered to the plaintiff bank for value, it is no defense to allege that a third party, president of the bank, had brought suit to recover the amount of the consideration on the note, to which action the bank was not a party, even though the bank is alleged to have been the agent of its president and to have advanced the money paid as consideration for the note at the request of the president.

Under the same circumstances it is no defense to allege that there was a failure of consideration for the note between the maker and the president by reason of a

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failure to complete building plans in relation to which the consideration of the note was paid, of which fact the holder had knowledge.

When a complaint by a holder of the promissory note alleges that it was made and delivered to the holder for value, it is no defense to allege as a separate defense that there was a failure of consideration for the note between the maker and a third party, if the consideration between the maker and holder is not denied in such separate defense.

Each separate defense must be construed as a whole, and the allegations of the complaint not denied in each separate defense are, for the purpose of the sufficiency of such defense, to be treated as admitted. Thus, the defense of the lack of consideration aforesaid is not good, if the holder's allegation that the note was delivered to it for value is not denied in the separate defense but only in a prior portion of the answer.

APPEAL by the plaintiff, the Empire Trust Company, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 8th day of May, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the plaintiff's demurrer to two separate defenses set up in the answer.

Robert L. Wensley, for the appellant.

George D. Beattys, for the respondent.

INGRAHAM, J.:

The action was upon a promissory note. The 2d clause of the complaint alleges that "on or about the 18th day of September, 1905, defendant made his certain promissory note in writing, dated on that day, whereby for value received, he promised to pay to the order of himself, one month after said date, the sum of seven hundred dollars at Empire Trust Company, New York City, with interest at six per cent per annum; and said defendant on or about said date, duly indorsed the said note and for value delivered the same to the plaintiff, who is now the owner and holder thereof."

The answer denies that "the allegations contained in paragraph 'Second' of said complaint which allege that defendant made his certain promissory note for value received and denies that for value he delivered the same to plaintiff."

The other allegation of the complaint being admitted, it follows that the defendant does not deny that he made the promissory note

and delivered the same to the plaintiff, the denial only being that he made the note for value and for value delivered the same to the plaintiff.

The first defense alleged is that at the commencement of this action there was pending an action in the Supreme Court between parties who, though nominally different, are in reality the same as in this action, and for the same cause as that set forth in the complaint herein, namely, to recover the sum of \$700, alleged to have been advanced to defendant by Le Roy W. Baldwin, which sum is the alleged consideration for the note set forth in the complaint herein; that in reference to said alleged claim of \$700 for which said note was given, the plaintiff herein represents and is the agent of said Le Roy W. Baldwin; that plaintiff herein had notice and knowledge of all the facts in reference thereto, and if it advanced any money on said note, it did so at the request and for the account of said Le Roy W. Baldwin, its president. The second defense alleged that the Brunswick Construction Company and Le Roy W. Baldwin, president of the plaintiff herein, and certain other interested parties, entered into an operation, the avowed purpose of which was to build a hotel and to pay for the same by the issue of certain bonds; that said persons agreed to underwrite a certain portion of said bonds, and in furtherance of their purpose obtained a loan of certain moneys, out of which was paid to said persons certain sums of money as a bonus or compensation for underwriting said bonds; that through the negotiation of some outside party as broker, said Le Roy W. Baldwin, and said defendant, entered into an agreement dated September 3, 1903, by the terms of which said defendant agreed to save, indemnify and hold the said Le Roy W. Baldwin harmless, under and by virtue of and as a party to said underwritten agreement, to the extent of \$20,000 of the bonds of the said Brunswick Construction Company; that the said plans and purposes of the said persons failed and said hotel was not constructed, and that the terms and conditions of the alleged agreements entered into in connection with the said undertaking have not been carried out or complied with, and that the said Baldwin was not really and actually compelled to pay out and advance on his own account any cash or moneys, and has not really suffered any damage, nor has plaintiff on his own behalf; that no bonds have been issued in accordance with

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the purposes above set forth, and that the whole negotiations and everything connected therewith are entirely within the control of said Le Roy W. Baldwin, and his intimate associates, in such a way that said plaintiff has suffered no damage whatever; that by reason of the facts set forth, the consideration of said note utterly failed, of all of which facts the plaintiff herein and said Le Roy W. Baldwin were cognizant; that the plaintiff herein had knowledge and notice of all said facts, and if it advanced any money on said note it did so simply at the request and for the account of Le Roy W. Baldwin, its president. To these two separate defenses plaintiff interposed demurrers which were overruled.

I do not think that the first defense is sufficient. The action is on a promissory note made by the defendant to his own order, and indorsed and delivered by him to the plaintiff for value. This separate defense does not deny any of these allegations. It is alleged that Baldwin had brought a suit to recover the sum of \$700 alleged to have been advanced to defendant by Baldwin, which sum is the alleged consideration for the note, but the defense not having denied that the note was delivered to the plaintiff for value, a recovery in Baldwin's action, to which the plaintiff is not a party, could not be a bar to an action on the note. The fact that the plaintiff is the agent of Baldwin, and advanced the money paid as the consideration for the note at the request of Baldwin, does not affect the liability of the defendant on the note.

Nor do I think that the facts alleged in the second defense are sufficient. This defense fails to deny the allegations of the complaint that the note was made by the defendant for value, and delivered to the plaintiff for value. It alleges certain facts, and that by reason of such facts the consideration of such note utterly failed. But these facts had nothing to do with the plaintiff and do not either expressly or by implication deny that the defendant delivered the note to the plaintiff for value, and that the plaintiff is now the holder and owner of it. Whether Baldwin, president of the plaintiff, or the other persons not named who entered into the arrangement to build the hotel were compelled to advance any moneys or suffered any injury in consequence of the failure of the parties interested to construct the hotel is entirely immaterial and does not tend in any way to controvert the allegations of the com-

plaint, that the defendant delivered the note to the plaintiff for value.

Nor is it a defense to an action on the note that if the plaintiff advanced any money on said note it did so at the request and for the account of said Baldwin, its president. The defendant having executed and delivered the note to the plaintiff, the sole question is whether or not there was any consideration as between the plaintiff and the defendant. All the allegations of fact as to the relation of the defendant and others with a corporation organized to construct the hotel and the agreement between these third parties in relation thereto are entirely immaterial. The sole defense attempted to be set up here is the failure of consideration and none of the facts alleged tend to show that as between the plaintiff and the maker of the note there was no consideration. The rule is now settled that each separate defense must be construed as a whole and that the allegations of the complaint not denied in such separate defense are, for the purpose of the sufficiency of such defense, to be treated as admitted. (*Douglass v. Phenix Ins. Co.*, 138 N. Y. 209.) And as neither of these defenses are sufficient upon their face without reference to other parts of the answer, the demurrer should have been sustained.

It follows that the judgment should be reversed, with costs, and the demurrer sustained, with costs, with leave to the defendant to amend the answer within twenty days on payment of costs in this court and in the court below.

PATTERSON, LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend on payment of costs in this court and in the court below.

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DETHLEF C. HANSEN, Appellant, v. THOMAS F. WALSH, Respondent.

First Department, January 11, 1907.

Practice — failure to serve printed papers on appeal — opening default.

The preparation, settlement and filing of a case or bill of exceptions is part of the record of the court below and the opening of a default in these respects is with the Special Term. But after the case is settled and filed, the filing and service of the printed papers upon which an appeal is heard are part of the appeal and the opening of any default therein lies with the Appellate Division.

APPEAL by the plaintiff, Dethlef C. Hansen, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of June, 1906, denying the plaintiff's motion to open his default in failing to serve printed papers on appeal from an order denying plaintiff's motion to place this action on the preferred calendar.

A. J. Dittenhoefer, for the appellant.

John D. Lindsay, for the respondent.

INGRAHAM, J. :

The action was for libel and the plaintiff made a motion for a preference. This motion was denied, and from the order entered upon that denial the plaintiff appealed. The plaintiff failed to serve the printed copies of the papers upon the appeal, as required by rule 41 of the General Rules of Practice, whereupon he made a motion at the Special Term to be relieved from the default. This default was in failing to file with the clerk of this court and serve upon the opposite party the papers upon which the appeal is to be heard in this court. Where there is a default in the service of a case on appeal, or in the filing of a case, as settled by the trial judge or referee, an application to open that default should be made at the Special Term; and where the default consists of a failure to file the printed copies of the papers on which the appeal is to be heard in this court, or to serve copies thereof upon the opposite party, the default is in this court.

The preparation, settlement and filing of the case, or bill of exceptions, is a part of the record of the court below and is to be prepared,

settled and filed there, and an application to be relieved from a default must be made at Special Term. After the case is settled and filed, as prescribed by the Code and General Rules of Practice, the filing and service of the printed papers upon which the appeal is to be heard, as required by the General Rules of Practice, are a part of the appeal, and any default is a default in a proceeding which is a part of the appeal and is regulated by the rules of this court.

The question whether such a default should be enforced must be settled upon a motion made in this court either to be relieved from the default or dismiss the appeal.

The order appealed from is affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM
JAY KOERNER, Appellant.

First Department, January 11, 1907.

**Crime—murder in the second degree—conviction sustained—various
alleged errors considered.**

When in a criminal action the jury comes in and asks if one juror can legally change his belief for the purpose of agreeing with other jurors, an exception to the court's refusal to inquire whether the jury could possibly agree upon a verdict is not well taken, if there is nothing to show that the jury were unable to agree or requested to be discharged.

Nor under such circumstances is it error for the court to refuse to hear the defendant's motion to discharge the jury in their presence.

When jurymen having been out nearly fifty seven hours ask for instructions, the court by requesting them to make further endeavors to reconcile their differences does not coerce a verdict.

When a trial justice suspects that a witness on the stand is being instructed by some one in the court room, it is better practice to direct the jury to retire before calling the attention of the prosecution to the fact; but if subsequently the jury are plainly instructed to disregard the incident, it is not reversible error.

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When an expert's testimony as to what symptoms would be manifested by a person shamming unconsciousness is merely a repetition of what has already appeared in evidence, and proves nothing, its admission is not reversible error.

Lay witnesses who have had transactions with the defendant may testify as to whether his acts impressed them as being rational or irrational.

When an expert has testified that the defendant is sane, basing his opinion upon a physical examination, and has also pronounced him sane when interrogated on a hypothetical question, it is not error to take his opinion based both upon his examination and the hypothetical question without repeating the same.

When there is no dispute that the deceased came to her death through the act of the defendant and one of the defenses is insanity, it is not error to allow experts, who have examined the defendant between the murder and the trial, to testify to the results of their examination. Under such circumstances the defendant's mental condition prior to the homicide and at the time of trial are proper subjects of consideration for the jury.

A defendant is not prejudiced by testimony as to his sanity subsequent to the homicide, which is stricken out.

When it is admitted that the deceased had broken her engagement with the defendant, it is not error to admit her letter to a third person stating that the engagement was broken.

APPEAL by the defendant, William Jay Koerner, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 15th day of March, 1898, convicting him of the crime of murder in the second degree, and also from an order denying the defendant's motion for a new trial.

K. Henry Rosenberg, for the appellant.

Robert C. Taylor, for the respondent.

McLAUGHLIN, J. :

The defendant was indicted for the crime of murder in the first degree, the indictment charging that on the 23d day of September, 1896, he willfully and feloniously killed one Rose A. Redgate. There have been two trials. The first resulted in a conviction of the crime charged in the indictment, but on appeal the judgment was reversed and a new trial ordered, upon the ground that error was committed in admitting certain evidence against the defendant's objection. (*People v. Koerner*, 154 N. Y. 355.) The second resulted in a conviction of murder in the second degree and the defendant again appeals, challenging the validity of his conviction upon various grounds, but principally that errors were committed

in the reception and rejection of evidence, and in considering them it is only necessary to refer briefly to some of the evidence set out in the voluminous record before us.

The fact that Rose A. Redgate, at the time stated in the indictment, was shot with a pistol in the hands of the defendant and, as a result of the injuries inflicted, died within a short time thereafter, is not disputed by the defendant. He, however, does claim that the evidence adduced at the trial fairly established that the shooting was accidental; that his purpose was to commit suicide, and in endeavoring to do so he placed the pistol against his temple, when, to prevent his carrying out his intent, the decedent grasped the pistol and it was accidentally discharged. He also claims that when the shooting took place he was laboring under such a defect of reason as not to know the nature or quality of his act or that it was wrong.

The evidence on the part of the People tended to establish that on the day the shooting took place the defendant went to the decedent's place of business, 27 Pine street; waited until she was through with her work, between five and six o'clock in the afternoon, and then went with her to Fourteenth street, between Sixth and Seventh avenues; that he there shot her three times, and two of the shots were fatal; that he had been acquainted with the decedent for some time and their relations were of an affectionate character; that at one time they were engaged to be married, but that the engagement at the time of the shooting had been broken by reason of the opposition of her father to the marriage; that by reason of this opposition the defendant had told the father if he did not marry the decedent nobody else should; and that the shooting was the deliberate, willful and intentional act of the defendant.

There was some evidence offered by the defendant to the effect that the pistol was discharged in decedent's attempt to wrest it from his hands, but when all this evidence is considered I do not think it established or would have justified a finding that the shooting was accidental. The number of shots, the location of the wound, the position in which the deceased fell, and other facts surrounding the shooting, indicate to the contrary and show that the pistol was intentionally discharged by the defendant.

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Much evidence was given — and indeed the defendant seems to have directed his attention principally to establishing the claim — that at the time the shooting took place he was laboring under such a defect of reason as not to know the nature or quality of his act, or that what he did was wrong. The evidence bearing on this subject tended to show that some of his relatives on both sides of the family had been afflicted with insanity and confined in asylums or sanitariums; that he himself when two years of age was injured upon the head; that when he was five years of age he had scarlet fever; when eight years of age, typhoid fever; and several years later received an injury which destroyed the sight of one eye; that for some time immediately preceding the shooting he had acted in an irrational way; that on the afternoon of the shooting he drank a pint of whisky and took forty grains of phenacetine in two twenty-grain doses; that he wrote a letter to his landlady indicating that he intended to commit suicide, and immediately following the shooting the defendant sank to the sidewalk in an unconscious condition and so remained until after he had been taken to the hospital and restoratives applied.

At the conclusion of the trial the evidence on the part of the People tended to establish the defendant's guilt of the crime charged in the indictment and required the submission of that question to the jury, and had it found a verdict of murder in the first degree, would have been sufficient to sustain the same, while that offered by the defendant bearing on his mental condition at the time the shooting occurred was such as to possibly justify the jury in finding that the defendant did not intentionally shoot the decedent. There being a sharp conflict in the evidence, therefore, as to the mental condition of the defendant at the time the shots were fired, requires an examination of the various errors alleged, for the purpose of ascertaining whether or not substantial justice had been done.

First, it is claimed that the defendant's constitutional and statutory rights were invaded, in that he was denied the right of counsel to fully participate in the trial. The record will be searched in vain to find any justification for the claim. After the jury had been out a long time and had returned and requested the court to inform them whether "One juror (can) legally and conscientiously, if he believes in one degree, for the purpose of agreeing with the other

jurors, in order to bring in a verdict, change his vote from a greater to a lesser degree," and the court had responded that the verdict of the jury should express the true and conscientious belief of each juror, the defendant's counsel requested the court to inquire whether the jury could possibly agree upon a verdict, which the court declined to do, and defendant excepted. The ruling was proper. The jury had not in any way signified, up to this time, that they would be unable to agree, nor had they made any request to be discharged; on the contrary, the question propounded would seem to indicate that eleven of the jurors had already agreed and the twelfth had not agreed because he was in favor of a verdict in the first degree, while the others were in favor of a verdict in the second. When the court declined to make the inquiry requested by defendant's counsel, he then moved to discharge the jury and was about to state the grounds when the court interrupted and refused to hear him, to which he excepted. The court very properly refused to hear defendant's counsel. The case was being considered by the jury. It had been summed up by the district attorney and defendant's counsel and, thereafter, remarks by either, under the guise of a motion, would have been highly improper. And for the same reason the court properly refused, when the jury returned with its verdict, to hear defendant's counsel before the verdict had been received. If counsel had any just complaint that the verdict, when rendered, was improper, then he had an ample remedy to protect all the rights of the defendant. (Code Crim. Proc. §§ 462-466.) The protection of such rights was not necessary nor did it justify acts which would prevent, in a measure at least, the orderly procedure of a trial. (*People v. Conlon*, 116 App. Div. 170; *People ex rel. Chanler v. Newburger*, 98 id. 92.)

Next it is claimed the jury was coerced into bringing in a verdict. The case was submitted to the jury at four p. m., March 9, 1898. They returned with their verdict at one-forty a. m., March twelfth—having deliberated a little over fifty-seven hours. The trial had been a long one, and while the jury had been out a considerable time it must be borne in mind that they had not in any way intimated, until just a few hours before they finally rendered their verdict, that they could not agree. There is absolutely nothing to indicate that the court coerced the jury into finding their verdict.

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All that can be said is that they were out about fifty-seven hours and they had, a few hours before, intimated they would be unable to agree, and the court, with appropriate instructions, had requested them to make a further endeavor to reconcile their differences. This, under the circumstances, was eminently proper. Indeed how long the jury should have been kept together rested in the sound discretion of the trial court. (*People v. Sheldon*, 156 N. Y. 268.) In addition to this, the reason already suggested why the jury did not sooner agree is deserving of consideration. They did not agree because one of their number evidently refused to vote for anything less than murder in the first degree.

It is also claimed that the court erred in striking out of its own motion and instructing the jury to disregard a portion of the testimony given by the defendant's witness Caroe and proceedings in connection therewith. While the witness Caroe was testifying the learned recorder discovered, or supposed he did, some one in the court room was indicating to the witness the manner in which he should answer the questions put to him, and he thereupon directed the district attorney to make an investigation of the matter by asking the witness certain questions. It undoubtedly would have been much better practice had the recorder directed the jury to retire while such questions were asked, and I am of the opinion he should have done so lest the jury might possibly be unduly influenced by the recorder's action when they came to consider and weigh the testimony of the witness. But this was a matter resting largely in the discretion of the recorder, he taking into consideration what had occurred and the atmosphere of the trial. However, it seems to me clear from what took place the following day when the testimony was stricken out and the jury instructed, in language so plain they could not fail to understand it, that they were to disregard what had happened the day preceding so far as the incident in question was concerned, that the defendant could not have been injured and the action of the recorder does not constitute reversible error. (*People v. Smith*, 180 N. Y. 125; *People v. Buchanan*, 145 id. 1; *People v. Hayes*, 140 id. 484.)

Error is also claimed in the court's permitting the People's witness, Dr. Bayard, to testify as to what symptoms are manifested by a person shamming unconsciousness. The testimony given by this

witness bearing on this subject ought to have been excluded, but it could not possibly have injured the defendant. The question was, "What are the symptoms manifested by a man who is shamming unconsciousness?" The answer was, "Probably will not speak or give evidence of hearing the question when he is spoken to. He usually does not move. He may. If he is insensible to pain he will not move when the stimulus to elicit pain is applied. For the most part he would appear as though asleep. I don't recall any more general symptoms than that." It may be borne in mind that Doctors Harrison and Donovan, who had examined the defendant immediately after the homicide, had testified as to what symptoms were present and each had stated that the defendant in his opinion, was shamming. When Dr. Bayard answered the question above quoted it amounted to nothing which had not already been made to appear. The answer, indeed, proved nothing. It was, at most, a mere expression of what a person "might" do and it would be doing violence to the intelligence of a jury to assume that they were misled by such answer and thereby rendered an erroneous verdict. (*People v. Mullen*, 163 N. Y. 312; *People v. Sutherland*, 154 id. 345; *People v. Carpenter*, 102 id. 238.)

It is also claimed that error was committed by permitting two lay witnesses, Kenneally and Osborne, to testify as to the rationality of the defendant. Kenneally was connected with a newspaper published in the city of New York and to whom the defendant a short time prior to the homicide had submitted a poem for publication, entitled "Pizen Pete." He had frequently seen the defendant, but while he could not state precisely the time when the article was submitted, he did remember the fact that the defendant submitted it to him at the same time, stating that he wrote it. Under such circumstances, it was competent for the witness to state whether the acts and conversation of the defendant impressed him as being rational or irrational. As to the witness Osborne, he was one of the official stenographers of the Court of General Sessions. The defendant some time prior to the homicide had been instrumental in instituting proceedings to punish certain persons for violations of the Excise Law, and during the course of which his testimony was taken by the witness Osborne acting in his official capacity. While he testified that he had no personal acquaintance

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with the defendant, and had no recollection, independent of his minutes, of the manner in which he had given his testimony, nevertheless it was proper for him to state whether or not the defendant's answers to the questions propounded impressed him as rational or irrational. Besides, if this could by any possibility have been error it is insufficient when the whole record is considered to justify a reversal. (*People v. Silverman*, 181 N. Y. 235.)

It is further claimed that the court erred in permitting Dr. Newton to express his opinion as to the responsibility of the defendant. An examination of the record shows that Dr. Newton first testified to his own examination, as a result of which he pronounced the defendant sane. A hypothetical question was then put to him, in answer to which he again pronounced the defendant sane. He was then asked whether he had heard all the testimony given at the trial. This was objected to and the objection overruled and he was permitted to state that he had. He was not then asked to give an opinion based upon the testimony which he had heard, but it was whether, assuming that testimony be true, as stated in the hypothetical question as well as his own examination of the defendant, he would pronounce him sane or insane. The objection to the question, and the exception taken to the adverse ruling thereto, as to whether he had heard all the testimony given at the trial, is unavailing. A similar question was asked in *People v. Osmond* (138 N. Y. 80) and was held harmless. Then came the following question: "Q. Now, assuming that testimony to be true, as I have stated in the hypothetical question, and assuming also your own examinations of this defendant, made in the Tombs, in your opinion was he sane or insane? I mean the explanation as you have detailed them here to-day." The question was objected to, the objection overruled, an exception taken, and the witness answered, "I believe he is sane." It is clear the witness, in answering the question, did not base his answer upon the truth of testimony given during the trial, but only upon the truth of testimony as stated in the hypothetical question; that is, he assumed that the facts stated in the hypothetical question were true. This seems necessarily to follow when in answer to a question put to him on cross-examination he stated: "In answering this hypothetical question put to me by Mr. Osborne, my answer is based upon the facts as he stated

them to me." In *People v. Truck* (170 N. Y. 203) a question somewhat similar was held to be proper. The witness was required to, and did give his opinion upon specific facts which were detailed, and there was, therefore, no necessity for repeating the hypothetical question at length. (*People v. Krist*, 168 N. Y. 19.)

Error is also alleged to have been committed in permitting Doctors Newton and Hamilton to testify, against objection and exception, to the several examinations of the defendant made by them intermediate the homicide and the trial. No error was committed in this respect. The defendant did not dispute the fact that the deceased came to her death from a bullet wound received from a pistol which he held. What he claimed was that the shooting was accidental, or that he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing. Under such circumstances his mental condition prior, as well as subsequent to the homicide and at the time of the trial was a proper subject for consideration by the jury, to the end that they might correctly determine whether or not his claim were true. (*People v. Hoch*, 150 N. Y. 291.)

It is also claimed the court erred in permitting the witnesses Shedlock and Dr. Ward to testify as to the rationality of the defendant at a time subsequent to the homicide. The answer to this alleged error is found in the one already discussed as to Doctors Newton and Hamilton, and is fully covered by the opinion in *People v. Hoch* (*supra*). So far as the testimony of Dr. Ward is concerned, the appellant seems to complain because the court of its own motion struck it out. It would seem from the opinion of the Court of Appeals that the same thing occurred on the former trial; that Dr. Ward's testimony was first admitted and then struck out, and it was held there was no error. (*People v. Koerner*, 154 N. Y. 366, 367.)

Finally it is claimed the court erred in admitting People's Exhibits 6 and 7—a letter and envelope—which the deceased sent to the wife of the witness Shedlock, stating in substance that her engagement to the defendant was broken. It is a little difficult to see what bearing this had on the issue which was being tried, unless it be to establish the fact that the engagement between the deceased and defendant was broken. But that fact was not disputed by the

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defendant. No claim was made by him to the contrary. However, I do not see how it could possibly have injured the defendant. Besides, it would seem that this same evidence was admitted on the former trial, and the Court of Appeals held that no error was committed.

In conclusion, I am satisfied from a careful consideration of the voluminous record that the defendant has had a fair trial, and no errors were committed which are sufficient to justify a reversal of the judgment. We are required under section 542 of the Code of Criminal Procedure to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. The decedent lost her life by the act of the defendant. There may possibly be some doubt—and the jury evidently thought there was and gave the defendant the benefit of it—as to whether his act which caused her death was premeditated, but there can be no reasonable doubt, as it seems to me, that he was responsible at the time for the act. Every act of his on the day of and immediately prior to the shooting indicates that he had intelligence enough to appreciate what he was doing and to distinguish between right and wrong. It may be that he intended to commit suicide, but if he did, his own acts would seem to indicate that he intended to kill Rose Redgate before he took his own life. It may be that he drank the pint of whisky and took the forty grains of phenacetine, but if he did so, it is quite evident that it was for the purpose of nerving himself to commit the crime which he did. If he had previously determined to commit the crime, then voluntary drunkenness was no defense. His act was none the less criminal on that account, although his condition might be considered in determining the purpose, motive or intent with which he committed the crime. (Penal Code, §§ 21, 22; *People v. Pekarz*, 185 N. Y. 470; *People v. Krist*, *supra*.)

I think the defendant was properly convicted and the judgment appealed from should be affirmed.

PATTERSON, P. J., LAUGHLIN, HOUGHTON and SCOTT, JJ., concurred.

Judgment affirmed. Order filed.

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PATRICK TIVNAN, Respondent, v. PATRICK H. KEAHON, Appellant.

First Department, January 11, 1907.

Master and servant—negligence—when manager of business not coservant—admission by answer—delegation of duty to give instruction.

When the plaintiff who was hired by the defendant's brother to work in a livery stable and was injured while endeavoring to start a gas engine, alleges that the brother was the defendant's manager and superintendent, which the defendant admits by answer, it is established so far as the management of the business is concerned that the brother was the *alter ego* of the defendant.

A master cannot escape responsibility by delegating to another the duty to give instruction to servants as to the operation of dangerous machinery. Hence, when the plaintiff, employed as a laborer, was directed to start a gas engine without instruction and was injured thereby, and there is evidence showing that such work necessitated instruction, the master is liable.

HOUGHTON and SCOTT, JJ., dissented, with opinion.

APPEAL by the defendant, Patrick H. Keahon, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of January, 1906, upon the verdict of a jury for \$8,700, and also from an order bearing date the 19th day of January, 1906, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

Frederick E. Fishel, for the appellant.

John E. O'Brien, for the respondent.

MCLAUGHLIN, J. :

On the 13th of August, 1901, the plaintiff went to work at defendant's livery stable, having been employed to perform the duties usually devolving upon laborers in such establishments, by Daniel Keahon, defendant's brother, through whom the business was conducted. Some two weeks later, following the instructions of Daniel Keahon, plaintiff lighted a gas engine in the basement of the building and a few minutes thereafter, with three other employees, started the engine, and in doing so received the injuries complained of, which necessitated the amputation of an arm.

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The evidence is sufficient to sustain the finding of the jury that the danger attendant upon the work of starting the engine necessitated the giving of special instructions to one delegated to perform it, and that lacking such instructions, plaintiff carried out his orders as would a reasonably prudent man.

The judgment appealed from must be affirmed unless it be held that the act of Daniel Keahon in directing the plaintiff to assist in starting the engine was that of a coservant. The complaint alleges: "1. That on or about the 13th day of August, 1901, and at the times hereinafter mentioned, defendant was the owner and proprietor of a boarding stable at Number 108 and 110 Tenth Avenue, in the City of New York, Borough of Manhattan, and conducted the same through his brother Daniel Keahon, who was the manager and superintendent thereof, and that on or about said 13th day of August, 1901, said defendant, through the aforesaid Daniel Keahon, employed plaintiff at a salary to work at said stable." The answer admits this allegation, which establishes that Daniel Keahon, so far as the management of the business was concerned, was the *alter ego* of the defendant. Indeed, if the defendant had testified at the trial to the relation which Daniel Keahon bore to him it is difficult to imagine in what way he could have more clearly and concisely stated facts which would have made the latter his *alter ego* in the entire management of the business.

Whatever apparent discrepancies exist in reported decisions in the disposition of cases arising under circumstances somewhat similar to the one under consideration have been caused by the varying character of the acts of the representatives rather than by any repudiation of the doctrine that the master is liable for any faults of omission or commission by the person or persons acting for him. This apparent discrepancy or misconception results probably from the fact that there is usually embodied in the *alter ego* a dual character, (1) that of the servant whose duties among those put upon the other employees in the prosecution of the business is certain and fixed; and (2) that of the representative of the master, in which capacity there exists greater and a more undetermined latitude of authority.

But a master cannot, by delegating to another the duty which rests upon him, of furnishing his employees with a reasonably safe

place in which to work and reasonably safe and suitable tools, implements, appliances and machinery with which to do his work, excuse himself from liability (*Eastland v. Clarke*, 165 N. Y. 420; *Benzing v. Steinway & Sons*, 101 id. 547; *Stringham v. Stewart*, 100 id. 516; *Pantzar v. Tilly Foster Iron Mining Co.*, 99 id. 368) any more than he can excuse himself from the duty which devolves upon him to instruct a servant theretofore unskilled to operate dangerous machinery. (*Brennan v. Gordon*, 118 N. Y. 489; *Strauss v. Haberman Mfg. Co.*, 23 App. Div. 1; *Fox v. Le Comte*, 2 id. 61; *affd.*, 153 N. Y. 680.) The rule which exempts a master from liability for the negligence of one to whom he has delegated the power to conduct a business enterprise, or a branch of it, is based upon the theory that the negligence of the person acting for the master is the act of a servant having no authority except to properly discharge the duties assigned to him, and not the act of the master. But this rule does not apply to the question here presented; because Daniel Keahon's act in directing the plaintiff to start the engine, as well as in his failure to give instructions as to the danger in doing so, was that of the master. Great danger was to be encountered in starting the engine unless started in a proper way. This was known to the master, but unknown to the servant. Therefore, the former was obliged to make known such fact to the latter, and to instruct him as to the proper manner of starting the engine, to the end that such danger might be avoided. (*Brennan v. Gordon*, *supra*.)

This obligation rested upon Daniel Keahon, because he had been intrusted by the defendant with the management of the business, and in this respect was his *alter ego* (*Corcoran v. Holbrook*, 59 N. Y. 517), and for his failure to properly discharge his duties as such, defendant is liable.

The judgment and order appealed from must be affirmed, with costs.

PATTERSON, P. J., and LAUGHLIN, J., concurred; HOUGHTON and SCOTT, JJ., dissented.

HOUGHTON, J. (dissenting):

I dissent from an affirmance of this judgment. I do not think the allegation of plaintiff's complaint, admitted by defendant's

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answer, should be interpreted as alleging that the defendant had surrendered all control of his business, and delegated all his duties and powers to his brother Daniel. The allegation is that at the times of the hiring and the subsequent accident the defendant was owner and proprietor of a boarding stable, "and conducted the same through his brother Daniel Keahon, who was the manager and superintendent thereof, and that on or about said 13th day of August, 1901, said defendant, through the aforesaid Daniel Keahon, employed plaintiff at a salary to work at said stable." That it was not so understood is manifest from what took place on the trial when Daniel Keahon was on the stand. The defendant's counsel asked him what he did for his brother in August, 1901. This was objected to on the ground that it was alleged by the complaint and admitted by the answer that he was conducting the business on behalf of his brother as foreman or superintendent. The defendant's counsel pointed out that the admission related only to the time of hiring and to the time of the accident, and the court remarked that that was all that was necessary and sustained the objection.

The fair and liberal interpretation of the allegation is that the brother Daniel was the superintendent of defendant in conducting the boarding stable, with power to hire and discharge men.

The particular work for which plaintiff was employed was to wash wagons and trucks, clean stalls and horses and cut wood. There is no claim that the defendant did not furnish the plaintiff with a safe place in which to do this particular kind of work which he was specially hired to do. Nor is there any claim that the gas engine in the cellar was not a perfect machine and in perfect repair. The only ground of negligence is that the superintendent of defendant being temporarily short of help around the barn took plaintiff from the work which he was hired to do and sent him to the cellar to do the alleged hazardous work of starting the engine without warning him of the danger that he might encounter of getting his arm caught in the fly-wheel if it started backward instead of forward.

It is true that there is no evidence that the defendant, the employer, was about the barn frequently or occasionally, and thus knew the work that plaintiff was employed to do; but in the absence of proof that he never came near the premises and knew nothing of the manner in which the business was being conducted, it must be

assumed, I think, that he knew for what particular work plaintiff was employed. In the absence of proof it must be assumed that the defendant, the employer, did not know that his superintendent was taking the plaintiff from his regular employment and directing him to serve at a more hazardous work.

Conceding that the dangers attending the starting of the gas engine were not obvious, and that plaintiff was entitled to a warning concerning them, I think the failure of the superintendent to give the warning, if one was necessary, was the negligence of a coservant and not that of the defendant, the master. If the plaintiff had been hired to start the gas engine and there was danger in the work, and he had had no experience in it, then very likely the failure of the superintendent to give the warning would have been the failure of the master. But he was hired for a work in which there was no danger, and was taken from that work by the superintendent and put to a more hazardous employment without the knowledge of the master, and such act, it seems to me, was a mere detail of the work for any negligence concerning which the master is not responsible.

One of the grounds upon which recovery was denied in *Crown v. Orr* (140 N. Y. 450) was that if the plaintiff, who was an infant, was directed by the foreman to perform another service than that for which he was employed, and one specially dangerous, without sufficient instruction, the fault was not that of the master but of a coservant.

In *Hussey v. Cogger* (112 N. Y. 614) the defendant did not personally supervise the work but employed a superintendent, competent and experienced, who had general charge of the work and authority to procure materials and engage the necessary workmen. An accident happened because the superintendent directed too few men to lift a heavy hatch. The master was held not liable notwithstanding such act of the superintendent. In the present case the proof discloses that the defendant had hired sufficient men of experience to start the engine, but they did not happen to be about the barn at the time the superintendent desired it started.

This action is not under the Employers' Liability Act but at common law. In such an action a servant who sustains an injury from the negligence of a superior agent engaged in the same general

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business cannot maintain an action against the common employer, although he was under the control of the agent and could not guard against his negligence. (*Keenan v. N. Y., L. E. & W. R. R. Co.*, 145 N. Y. 190; *Gallagher v. McMullin*, 25 App. Div. 571.)

There is no claim that the superintendent was not competent, and hence the master furnished, not only a competent superintendent, but a safe place for plaintiff to perform the work for which he was hired, as well as sufficient competent men to do the work which plaintiff was directed to do. The master did not know and could not apprehend that his superintendent would take the plaintiff from his regular work and put him to a hazardous one without instruction. In failing to give the instruction the superintendent did not stand in place of the master as he would with respect to keeping the place to work reasonably safe and the machinery in repair.

Under the circumstances disclosed, the negligence, if any there was, was that of a coservant, although of a higher grade, and the case appears to me to be governed by a long line of decisions, of which those above referred to, and *Crispin v. Babbitt* (81 N. Y. 516); *Loughlin v. State of New York* (105 id. 159); *Cullen v. Norton* (126 id. 1); *Perry v. Rogers* (157 id. 251); *Maltbie v. Belden* (167 id. 307), and *Madigan v. Oceanic Steam Nav. Co.* (178 id. 242), are examples.

O'Brien v. Buffalo Furnace Co. (183 N. Y. 317) is not to the contrary, for that case turned upon the permitting the continuance of an act obviously dangerous to all of defendant's servants.

The defendant has died since the judgment. It may be possible that on a retrial the plaintiff could establish a cause of action. That he may have an opportunity to do so, under the provisions of section 764 of the Code of Civil Procedure, the reversal should be on questions of law only.

The judgment should be reversed on questions of law only and a new trial granted, with costs to the appellant to abide the event.

SCOTT, J., concurred.

Judgment and order affirmed, with costs. Order filed.

JOHN KIRK and Others, Plaintiffs, v. JOHN McCANN and THEODORE KAUFFELD, as Executors of and Trustees under the Last Will and Testament of JOHN SULLIVAN, Deceased, Defendants.

First Department, January 11, 1907.

Will — unlawful accumulation — when judicial settlement of trustees' accounts binding — settlement of accounts does not authorize subsequent illegal accumulations.

A trust which directs the trustees to apply surplus income to the payment of mortgages upon real estate of which the testator died seized constitutes an unlawful accumulation and is invalid.

So, too, a direction to invest surplus income of the trust fund in bond and mortgage until the termination of the trust period of two lives is an unlawful accumulation and invalid.

But when the accounts of the trustees showing such application of the surplus income and investment thereof have been judicially settled by the surrogate on the appearance of all parties without objection, the decisions are binding so long as they stand unreversed and are *res adjudicata*, irrespective of whether the parties are adults or infants if represented by special guardian.

But the decisions are binding only as to accumulations and investments already made and passed upon by the surrogate, and are not controlling as to a new application of the surplus income, and form no bar to a subsequent adjudication holding the direction invalid as to property subsequently coming into the hands of the trustees.

The Surrogate's Court has no inherent power to construe the provisions of a will except as a necessary incident to its general powers to control executors and testamentary trustees and to direct the payments or charging of legacies or the like.

INGRAHAM and McLAUGHLIN, JJ., dissented.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Henry C. Eldert, for the plaintiffs.

John F. McCann, Jr., for the defendants.

HOUGHTON, J.:

John Sullivan died leaving a last will and testament, admitted to probate on the 9th day of March, 1886, by which he gave to his executors and trustees, these defendants, all of his property in

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trust, to collect the rents and income and to pay during the lifetime of his wife Honora and his son James stipulated amounts to certain beneficiaries annually, with the further provision that such executors and trustees should "apply from time to time any surplus income received by them not expended for the benefit of the beneficiaries of the several trusts herein to the payment and extinguishment of any and all mortgages on my real estate, at such time as may be proper, instead of otherwise investing such surplus in the manner hereinbefore directed." The prior direction was that they should accumulate and keep invested any surplus income in bonds secured by first mortgages on real estate in the city of New York.

At the time of testator's death the mortgages upon his real property aggregated \$32,960. Following these directions of the will, the defendants as trustees, from the surplus income received by them from time to time, have paid off mortgages upon the decedent's real estate, aggregating \$18,213.27, and have invested in bond and mortgage from such surplus income the sum of \$10,500.

On the 23d day of August, 1887, the defendants presented to the Surrogate's Court of the county of New York, where the will of testator was probated, a petition praying that their account as filed might be settled. A citation was duly issued and all parties interested under the will, including these plaintiffs, were duly cited, special guardians being appointed for such as were infants, and, without objection, the accounts were passed and a decree entered on the 3d day of November, 1887, judicially settling and allowing the same, and discharging the defendants in their capacities of executors. The account so judicially settled and allowed showed the payment of specified sums from surplus income toward liquidation of the mortgages upon testator's real property. On the 16th day of April, 1890, the defendants as trustees filed an account which showed further payments from surplus income, in liquidation of such mortgages, together with a petition praying that the same be judicially settled. All parties were duly cited and appeared, none objecting except plaintiff John Kirk, who objected on the ground that the provisions of the will authorizing the extinguishment of mortgages out of surplus income constituted an unlawful accumulation. The issues raised by this objection were referred by the

surrogate to a referee, who reported that the provision of the will was not unlawful and that the payments had been properly made, and his report was confirmed by the Surrogate's Court by decree entered the 15th day of March, 1891, which judicially settled and allowed the accounts as filed. On the 31st day of May, 1895, another judicial decree was made settling and adjusting defendants' accounts containing payments from surplus income in liquidation of such mortgages, upon which all parties were duly cited and no objection made. This decree did, however, contain a provision reserving to any party the right to take such proceeding and action in reference to surplus accumulations as he might deem proper, either at the foot of the decree or otherwise. No action, however, was taken, and on the 1st of April, 1901, a further decree of judicial settlement of accounts containing items of disbursement in liquidation of mortgages and investment in bond and mortgage from surplus income was made, upon the rendering of which all parties were cited and no objection made.

The plaintiffs now claim that the direction of the will to accumulate income and apply the same to the payment of existing mortgages upon the testator's real property constitutes an unlawful accumulation, and desire a judgment directing the defendants to restore to them such sums as they have applied to the liquidation of such mortgages and to pay over to them such sums as they have invested in bond and mortgage out of the surplus income; and insist that the various decrees of the Surrogate's Court entered on the several judicial accountings to which they were made parties are not a bar to such a claim.

Under the decision of *Hascall v. King* (162 N. Y. 134) the direction of the will to apply the surplus income to the payment of mortgages upon the real estate of which the testator died seized, constituted an unlawful accumulation and was invalid. The direction to invest the surplus income in bond and mortgage until the termination of the two lives upon which the trust depended is also plainly an unlawful accumulation and invalid.

So far, however, as either has been done and passed upon by the various decrees of the Surrogate's Court on judicial settlement of defendants' accounts, the plaintiffs are precluded from now raising any question. These accounts showed certain sums from surplus

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income applied to the liquidation of mortgages upon the real property of which testator died seized, and certain investments in bond and mortgage. The surrogate had jurisdiction in settling such accounts to construe the will for the purpose of determining whether or not the payments were properly made. The plaintiffs were duly cited and properly represented by special guardians. Whether the decision of the Surrogate's Court was right or wrong, as long as the various decrees stand unreversed they are binding and valid adjudications; and this irrespective of whether the parties are infants or adults. (*Matter of Tilden*, 98 N. Y. 434; *Matter of Hawley*, 100 id. 206.)

With respect, however, to any surplus income now in the hands of defendants not yet applied to the payment of mortgages upon testator's real property or not invested in bond and mortgage and approved by the various decrees of the Surrogate's Court, the plaintiffs are entitled to relief. None of the various decrees which were entered purported to direct the defendant trustees with respect to the manner in which surplus income should be thereafter applied. They simply approved the manner in which they had theretofore been applied, as set forth in the various accounts. A Surrogate's Court has no inherent power to construe the provisions of a will, except as a necessary incident to its general powers to control executors or testamentary trustees and to direct the payment or charging of legacies and the like. (Code Civ. Proc. § 2472, subds. 3, 4, § 2481, subd. 11; *Washbon v. Cope*, 144 N. Y. 287; *Matter of Davis*, 105 App. Div. 221.) Although the decrees of a Surrogate's Court made upon the accountings of trustees are conclusive as to the transactions and payments covered by such accountings they form no bar to the proper decision of the question so far as it relates to property coming to the hands of the trustee subsequent to the accounting and still in his hands. (*Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Hoyt*, 160 id. 607; *Rudd v. Cornell*, 171 id. 114.) In *Rudd v. Cornell* (*supra*) there had been a judgment in an action for an accounting and a specified share of the accrued income then in the hands of the trustees had been decreed, and it was claimed that that judgment was *res adjudicata* with respect to the claimant's share in any subsequently acquired income. In delivering the opinion the court, MARTIN, J., says: "While that

adjudication was final and conclusive between the parties as to the accounting then had, it is no bar to the decision of the question now presented as to the proper disposition of the income of the property at present in the hands of the trustees."

To such extent, therefore, as indicated, the plaintiffs are entitled to judgment against the defendants.

PATTERSON, P. J., and CLARKE, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

I think the decree of the surrogate upon the accounting by the testamentary trustee entered on the 15th of March, 1891, involved an adjudication that the provision of the will directing the application of the surplus income to the payment of the mortgages upon the testator's real property was valid and not an unlawful accumulation of income prohibited by the law. There was presented on that accounting by one of the plaintiffs a question as to the validity of this provision of the will. He claimed that the application of the surplus income to the payment of the mortgages upon the testator's real estate was invalid, as an unlawful accumulation of income. This question, with the other questions that were presented upon the accounting, was referred to a referee, who reported that the provisions of the will were valid and not an unlawful accumulation of income, and his report was confirmed by the surrogate and a decree entered in conformity with this report. The surrogate has authority to construe wills when a party expressly puts in issue, before the surrogate, the validity, construction or effect of any disposition of personal property contained in a will of a resident of the State (Code Civ. Proc. §§ 2624, 2812), and a decree made upon a judicial settlement of the accounts of a testamentary trustee has the same force as a judgment of the Supreme Court to the same effect as against each party who was duly cited or has appeared, and every person who would be bound by such a judgment rendered in an action between the same parties. (Code Civ. Proc. § 2813.)

There can be no doubt that if an action had been commenced in the Supreme Court for a judicial settlement of the surplus income and an issue as to the validity of this provision of the will had been presented by the pleadings and the court had adjudicated that the

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provision was valid and directed the trustee to apply the surplus income to the payment of the mortgages upon the testator's real estate such judgment would have been a controlling adjudication binding upon the parties to that action in a subsequent action relating to the construction of the will, and under this provision of the Code the decree of the surrogate being given the same effect as the judgment of the Supreme Court, was a binding adjudication upon all the parties to that proceeding and is controlling in this action. All of the parties interested in the estate were parties in the proceeding before the surrogate. The same question presented, namely, the validity of this provision of the will, was at issue and the decree adjudicating that this provision of the will was not a violation of the statute as to unlawful accumulations of income is binding upon the parties to this action. (*Rudd v. Cornell*, 171 N. Y. 114.) In *Thorn v. De Breteuil* (179 N. Y. 64) it is said: "The well-settled general rule of estoppel * * * is 'that the estoppel in a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered.'" It having been, therefore, adjudicated that this clause of the will directing the application of the surplus income was valid, that adjudication estops any of the parties to this action from questioning its validity, and under the submission judgment should, therefore, be entered for the defendant, without costs.

McLAUGHLIN, J., concurred.

Judgment ordered for plaintiffs. Settle order on notice.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE INTERNATIONAL BANKING CORPORATION, Appellant, v. FRANK RAYMOND and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.

First Department, January 11, 1907.

Tax — when foreign banking corporation may be taxed — when capital is employed here.

A foreign banking corporation having a large office in this State, which sells foreign bills of exchange and pays drafts drawn upon it in this State, etc., does business in this State and is taxable, although it has no certificate permitting it to do business here.

When the business carried on by such banking corporation consists in selling its own drafts on its foreign branches and agents, drafts drawn by these agents upon the New York branch constitute moneys and credits employed and invested in this State and are subject to taxation.

Such demands and evidences of debt sent here for collection are not exempt from taxation by virtue of subdivision 18 of section 4 of the Tax Law, because they are held by the corporation itself and not by its agent, and because they are not sent here for collection but belong to the corporation and are used here in its business.

APPEAL by the relator, The International Banking Corporation, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 27th day of November, 1906, dismissing a writ of certiorari theretofore issued herein, and affirming an assessment against the relator.

David Rumsey, for the appellant.

Curtis A. Peters, for the respondents.

HOUGHTON, J. :

The relator is a banking corporation, organized under the laws of the State of Connecticut, where it maintains a statutory office. It has a place of business at No. 60 Wall street, in the city of New York, with an office staff of fifty or more persons. It maintains branches in the cities of Washington and San Francisco and at many of the commercial centers of foreign countries. Its business

is the purchasing and selling of foreign bills of exchange to travelers and for commercial purposes and the paying of such drafts as may be drawn on it at the city of New York by its various branches and agents and the collecting of such as may be transmitted by them to it for that purpose with an occasional loaning temporarily of surplus moneys. The average amount of moneys on hand does not appear, but at one period of the year for which the tax was levied the sum was \$3,000,000. The relator has no certificate permitting it to do business in this State, but it has been conducting its business substantially as it now does since 1902, and all of its commercial affairs are managed by its directors and officers at the New York office.

After a hearing the respondent commissioners determined that the relator was employing capital to the extent of at least \$69,500 in its business in this State and fixed assessment against it at that sum. A writ of certiorari was obtained which was dismissed, and from the order of dismissal this appeal is taken.

The relator urges that it is not doing business in this State within the meaning of section 7 of the Tax Law (Laws of 1896, chap. 908), and that if it is the capital which is invested in such business is not within this State nor under its jurisdiction, but must be deemed to be held in the State of Connecticut, the legal situs of the corporation, and further, that whatever capital is employed here is exempt from taxation under subdivision 13 of section 4 of the Tax Law.

We think none of these contentions can be upheld. Manifestly the relator is doing business within this State. It maintains here an office and has for some years. Its business affairs and branches and agencies are managed by and from that office, which is one of magnitude; and apparently it is doing the business that any international banking house would do with extensive and assured connections. Notwithstanding the corporation is a foreign one, and hence a non-resident to the extent of the capital which is invested in its business conducted in this State, it is taxable under the express provisions of section 7 of the Tax Law. But the relator insists that the \$123,000, which was the basis of the assessment, less the deduction for debts, consisted wholly, except the \$6,000 of bank deposit, of bills, notes and drafts receivable which were not invest-

ments in business, but were simply debts due to it and in no sense an investment in business.

It is evident that the relator must employ some capital to carry on the business which it does. The business which it carries on is the selling of its own drafts on its own branches and agents. Not only to reimburse themselves do these branches and agents draw upon the relator, but they draw upon it to pay such drafts as they have sold. In this way it may be assumed such branches and agents become indebted to the main office in the city of New York. In turn this indebtedness is used for the payment of such further drafts as may be drawn and sold by the home office. These credits and evidences of indebtedness, therefore, constitute relator's stock in trade. They were physically in the city of New York and held there, and were not in transit to the State of Connecticut, and we think such use of moneys and credits is the employment and investment of capital within the State which subjects it to taxation.

A foreign corporation doing business within this State is taxable upon credits and bills receivable due the corporation from such business. (*People ex rel. Burke v. Wells*, 184 N. Y. 275; *People ex rel. Yellow Pine Co. v. Barker*, 23 App. Div. 524; *affd.*, 155 N. Y. 665, on opinion below; *People ex rel. Armstrong Cork Co. v. Barker*, 157 id. 159.)

The case of *People ex rel. New England Loan Co. v. Roberts* (25 App. Div. 16; *affd.*, 156 N. Y. 688, on opinion below), although arising under the franchise provisions of section 182 of the Tax Law, is instructive and closely resembles the case under consideration. The relator in that case was a foreign corporation whose business consisted of loaning money on bonds and mortgages upon property in Western States. It had a place of business in the State of New York and kept on hand a certain number of Western securities which were sold and replenished in the course of its business, the proceeds of which sales were temporarily deposited and subsequently sent for reinvestment. It was held that to the extent of the moneys temporarily on hand and the securities through which it transacted its business it employed capital within this State and was, therefore, subject to a license tax.

Finally it is urged that even if these demands and evidences of debt can be deemed within the State they were sent here for collec-

tion, or are moneys of a non-resident under the control or in the possession of his agent transmitted here for the purpose of investment or otherwise and that they are exempt from taxation by the provisions of subdivision 13 of section 4 of the Tax Law, and that the decision in *People ex rel. Bank of Montreal v. Comrs., etc.*, (59 N. Y. 40) compels us to so hold.

One answer to this contention is that they are not in the hands of an agent of the relator, but are held by the relator itself. Another answer is that they have not been transmitted here by the relator for collection, but have been sent here to the relator, because they belong to it and because it desires to use them here in its business. The case of *People ex rel. Bank of Montreal v. Comrs., etc. (supra)* apparently turned upon the fact that the foreign corporation was employing an agent to transact its business in this State, and was not itself doing business here. In construing the act of 1855 (Chap. 37) in connection with the act of 1851 (Chap. 176, § 2)—(which two laws contained substantially the provisions found in section 7 and subdivision 13 of section 4 of the present Tax Law), Judge RAPALLO, in the course of his opinion, says: "As the law stood at the time of the passage of the act of 1855, there was no authority for taxing a non-resident in respect to his personal property. If such property was in the hands of a resident trustee or agent, the agent or trustee and no other person could be assessed therefor. But if the non-resident owner controlled and managed his own business in New York, without the intervention of a resident agent, there was no method provided for taxing his assets here. Hence the peculiar language of the act of 1855 which subjects to assessment and taxation non-resident persons, etc., doing business in this State as *principals or partners, special or otherwise.*" It was finally concluded that so long as the foreign principal retained the control of its funds, and the transactions of the agent in this State were confined to the mere loaning of the money in single investment or in many, such act was not the carrying on of business and that no tax could be imposed.

This strict interpretation of the statute does not seem to have found great favor with the courts, for, so far as we have been able to discover, the case has never been cited in any of the numerous

tax decisions, except in *People ex rel. New England Loan Co. v. Roberts (supra)*, where it was held not controlling, as it manifestly was not. Whether the decision is to be deemed a correct interpretation of the statute or not, it does not apply to the present case, for such funds as the relator employed in this State were not in the hands of an agent, but of itself.

Our conclusion is that the relator was properly assessed, and that the writ was properly dismissed, and that the order should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and CLARKE, JJ., concurred.

Order affirmed, with costs. Order filed.

JOHN PEIRCE, Respondent, v. JOHN M. CORNELL, Appellant.

First Department, January 11, 1907.

Contract — Statute of Frauds — when contract evidenced by correspondence — evidence — measure of damages.

Parties, by an interchange of correspondence and telegrams, may make a valid contract enforceable by either, and its validity is not necessarily affected because of a stipulation to reduce the contract to a more formal agreement.

The test is whether or not the proposition by one party and its acceptance by the other shows that their minds have met as to the terms of a contract leaving no essential term to future agreement.

The plaintiff was under contract to erect a building, and invited proposals for the ironwork. The defendant's agent examined the plans and specifications, and after some negotiations wrote to the plaintiff that it would furnish the ironwork for a sum stated, the steel to be purchased from parties named by the plaintiff, and that the defendant would furnish a bond, etc.

The plaintiff acknowledged the letter in writing, stating: "I accept the offer contained therein to erect the iron and steel work, and will submit a contract for you to sign in due season."

Held, that the correspondence constituted a valid and enforceable contract in which no essential element was lacking;

That upon a breach of said contract by the defendant in refusing to furnish the ironwork, except at an advanced price, the plaintiff was entitled to show on the question of damage the actual cost of doing the work for which the defendant had contracted;

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That although the defendant, with plaintiff's consent, had offered a new proposition at an advanced price, the same being made with the understanding that it should in no way affect plaintiff's claim for damages under the original agreement, he was under no obligation to accept it.

APPEAL by the defendant, John M. Cornell, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of July, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 6th day of August, 1906, denying the defendant's motion for a new trial made upon the minutes.

Lemuel Skidmore, for the appellant.

L. Laflin Kellogg, for the respondent.

SCOTT, J. :

In the years 1897 to 1900, inclusive, the defendant was engaged in business, in the city of New York, in the furnishing and erection of structural and ornamental steel and iron work for buildings under the name or style of "J. B. & J. M. Cornell." During the same period, and for many years prior thereto, the plaintiff was in business as a contractor for the erection of buildings in the city of New York and elsewhere.

On December 17, 1897, the plaintiff executed a contract with the city of New York for the erection of a large public building in that city to be known as the Hall of Records, and for the erection of which a considerable quantity of structural steel and iron would be required. The architect employed by the city prepared plans and specifications showing, among other things, the amount, kind and dimensions of the structural steel and iron work which would be required to construct the building according to the plans therefor. The plaintiff thereupon invited proposals for the steel and iron work from a number of concerns engaged in the business, and among others addressed such an invitation to defendant. A representative of defendant examined the plans and specifications in the office of the architect, and obtained a copy thereof, which was delivered to defendant. After some negotiations letters were exchanged, which form the basis of this controversy, and which read as follows :

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NEW YORK, *February* 18, 1898.

"MR. JOHN PEIRCE,

"Temple Court Building,

"New York City :

"DEAR SIR.— We will furnish and erect the iron and steel work, etc., for the new Hall of Records, as called for by the plans and specifications of Mr. J. R. Thomas, architect, for the sum of two hundred and fifty thousand dollars (\$250,000).

"We will purchase our steel structural work from parties to be named by you.

"It is understood that we are to furnish a bond from the United States Fidelity & Guaranty Company for twenty-five (25%) per cent of the amount of the contract.

"We understand this to be in accordance with our interview with you of yesterday.

"Yours very truly,

J. B. & J. M. CORNELL."

"NEW YORK, *Feb'y* 23, 1898.

"MESSRS. J. B. & J. M. CORNELL,

"26th Street and 11th Avenue,

"New York City :

"GENTLEMEN.— Acknowledging yours of the 18th instant, I have to say that I accept the offer contained therein, to erect the iron and steel work, etc., required under my contract for the new Hall of Records building, and I will submit a contract for you to sign in due season.

"Yours truly,

"JOHN PEIRCE."

It appears that just prior to the exchange of these letters plaintiff had stated that if he made a contract with defendant he should desire that the defendant would purchase the structural steel work from the Pencoyd Steel Works represented by Messrs. A. & P. Roberts, which explains the statement in defendant's letter that he would purchase the structural steel from parties to be named by plaintiff. Accordingly, before writing the above letter of February eighteenth, defendant had obtained a price for the structural steel from the Pencoyd Works, which he had accepted, upon receiving the above-quoted letter from plaintiff. It does not appear that

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these letters, or the substance thereof, were communicated to plaintiff. Plaintiff proceeded with his contract with the city, and nothing was done as to putting the agreement between plaintiff and defendant into more formal shape until March 14, 1899, when defendant wrote to plaintiff that the Pencoyd Works had stated that owing to the long period that had elapsed, and the rise in the cost of raw material, they could not furnish the structural steel except at an advance of \$21,500, and the defendant stated that, for similar reasons, the price of the balance of the work, not to be furnished by the Pencoyd Works, should be advanced \$16,500, making a total increase of price for the work to be done by defendant for plaintiff of \$38,000. The plaintiff refused to accede to the proposed increase of price and insisted that under the letters exchanged in February, 1898, the defendant was bound to furnish and set up the steel and iron work at the price then agreed upon. Defendant refused to be bound by the agreement made in February, 1898, but offered to reopen negotiations upon the basis of an increased price. Still insisting upon his right to hold defendant to his agreement of February, 1898, plaintiff on March 27, 1899, offered to consider a new proposal, on the understanding, however, that the negotiations for a new agreement should in no way affect any claim for damages which he might have against defendant by the reason of the refusal of the latter to abide by his proposal of February 18, 1898. The defendant's only reply was to submit a new proposal at \$288,000, unaccompanied by any agreement that the acceptance of the proposal should not affect plaintiff's claim for damages if he had any. Plaintiff thereupon proceeded to open negotiations with other persons, and finally made a contract with another firm to do the work which defendant had proposed to do, but at a price in excess of defendant's original price by \$103,788.65, for which sum plaintiff has recovered judgment for damages.

The principal question involved in this appeal is whether or not the letters exchanged between plaintiff and defendant in February, 1898, constituted a valid enforceable contract. It is well settled that parties may by the interchange of letters and telegrams make a valid contract, which is enforceable by either, and that its validity is not necessarily affected because of a stipulation to reduce the contract to a more formal agreement. (*Sanders v. Pottlitzer Bros. Fruit*

Co., 144 N. Y. 209; *Pratt v. Hudson River R. R. Co.*, 21 id. 305.)

Of course, when this rule is invoked care must be taken not to misconstrue as a completed agreement letters which were intended merely as a part of the preliminary negotiation for a contract. (*Brown v. N. Y. C. R. R. Co.*, 44 N. Y. 79.) The test is whether or not the proposition by one party and its acceptance by the other shows that the minds of the parties met as to the terms of the contract, leaving no essential term to future agreement. As was said in *Pratt v. Hudson River R. R. Co.* (*supra*), quoted with approval in *Sanders v. Pottlitzer Bros. Fruit Co.* (*supra*): "A contract to make and execute a certain written agreement, the terms of which are specific and mutually understood, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be if executed. If, therefore, it should appear from the evidence that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying those terms should be drawn and executed by the respective parties, this is an obligatory contract which neither party is at liberty to refuse to perform." In the present case there is no element essential to a complete contract which is not to be found in the letters which passed between the parties. The work to be done and the materials to be furnished were identified by reference to the architects' plans and specifications, and it is not contended that there was any doubt or ambiguity on this score. The price to be paid by plaintiff was fixed. The stipulation as to the source from which defendant was to obtain a certain part of the material was included in the proposal, as was also a precise stipulation as to the security which the defendant was to give for the performance of the agreement. There was no element lacking in anywise essential to a complete contract, and there is nothing to be found in either letter suggesting that any contract stipulation remained to be agreed upon in the future.

That a formal contract was not tendered by plaintiff is quite unimportant, and seems to have been so considered by both of the parties. It is true that one of defendant's agents testifies that he, on

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several occasions, asked plaintiff when the formal contract would be ready, but there is nothing in the case to show that the defendant ever demanded or insisted upon the formulation of such a contract, and it is very significant that when defendant determined to withdraw from his agreement, he did not base his refusal to perform upon plaintiff's neglect to tender a formal contract for execution, but placed it solely and exclusively upon the ground that the price of steel and iron had advanced so that it would be unprofitable to do the work at the price proposed.

It is true that reference is made by the defendant to the length of time which had elapsed since the exchange of letters, but the defendant does not base his refusal to perform the work on the ground of delay, but solely upon the advance in price. As to the delay in ordering deliveries it does not appear that it was unreasonable, and we do not understand the defendant as seriously claiming that it was.

The defendant knew when he made the proposal what the general character and size of the building was to be, and doubtless realized that the demand for steel would depend upon the preliminary or preparatory work which plaintiff as general contractor for the building might be required to do, before he could begin to use steel or iron on the structure.

From the letters themselves, the circumstances under which they were exchanged, and the subsequent acts of the parties we think that the jury were quite justified in finding that the parties intended to make, and understood that they were making, a valid binding contract by the letters which they exchanged in February, 1898, and that defendant's present contention that the agreement was merely tentative and not intended to become effective until a more formal contract had been entered into, is a mere afterthought put forth as an excuse for receding from an agreement which it had become unprofitable to fulfill. We are of the opinion that the court committed no error in permitting plaintiff to prove what it actually cost him to do the work for which defendant had contracted. (*Mayor, etc., of N. Y. v. Second Avenue R. R. Co.*, 102 N. Y. 572.) When defendant had refused to proceed with the work it became plaintiff's duty to proceed with reasonable and usual diligence to procure the work to be done as cheaply as possible, so as

to limit the claim for damages. Whether or not he did so proceed was a question for the jury. It was fairly submitted to them and we find no reason in the evidence to question the justness of their conclusion.

The plaintiff was under no obligation, as we consider, to accept defendant's offer to do the work at an advance of \$38,000. When that offer was made plaintiff was in the position of claiming, and with reason, that defendant was bound to do the work under his former proposal. At the very least that was then a debatable claim not without a plausible basis.

Plaintiff expressed his complete willingness to accept a new proposal from defendant at a higher figure, conditioned only upon the mutual understanding that such acceptance should not be construed as a waiver of any right which he might then have under the earlier proposal and acceptance. This was a reasonable condition, and one which it was unreasonable for defendant to refuse, and his submission of a new proposal without reference to the proposed conditions must be deemed a refusal to accede to it. No other question presented by the appeal seems to call for extended discussion.

The judgment and order should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment and order affirmed, with costs. Order filed.

CLARA MULLER, Respondent, v. MEYER VESELL, Appellant.

First Department, January 11, 1907.

Negligence — injury by dumbwaiter — verdict against weight of evidence.

The plaintiff, a tenant, was injured by the fall of a dumbwaiter on the premises, and claimed that the rope was defective and that the landlord had been notified of the defect.

The evidence considered, and

Held, that a verdict for the plaintiff was against the weight of evidence.

APPEAL by the defendant, Meyer Vesell, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the

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clerk of the county of New York on the 5th day of June, 1906, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 4th day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

Benno Loewy, for the appellant.

Frank Herwig, for the respondent.

SCOTT, J.:

The plaintiff has recovered a verdict for damages for an arm broken, as alleged, in consequence of defendant's negligence in permitting a dumbwaiter in a tenement house owned by him to become unsafe. The verdict is challenged as contrary to all the credible evidence in the case. The house was a five or six-story tenement with dumbwaiter running from top to bottom, and used by all the tenants in the building. The plaintiff resided on one of the lower floors with her daughter and son-in-law, the latter acting as janitor of the building. The plaintiff's story is that on April 8, 1900, she desired to use the dumbwaiter to send ashes down to the cellar; that she looked into the shaft and found that the dumbwaiter was two or three stories above her; that she pulled the appropriate rope to cause it to descend, when the rope which suspended it broke and the dumbwaiter fell, catching her arm and breaking it.

It is significant, in view of the other evidence in the case, that more than fifteen months elapsed after the accident before suit was brought, and in all that time no notice was given to defendant or his agent, or, so far as appears, to any one else that plaintiff claimed that her arm had been broken in the way she now says it was. As has been said, plaintiff's son-in-law was janitor of the building and remained such for about a year after April 8, 1900. It was soon after he ceased to be janitor and had moved out of the building, and not until then, that it appears to have first been claimed that the injury was caused by the dumbwaiter.

It was positively testified to by the plaintiff and her witnesses that the accident happened on April 8, 1900, and that that day fell on a Tuesday. It was said that the plaintiff's daughter did the washing on Tuesdays, and that it was because she was washing on the day of the accident that her mother used the dumbwaiter. The

son-in-law testified that he went to work on the day of the accident and did not return until six or half-past six at night. It was conceded on the trial, however, that April eighth did not fall upon a Tuesday but upon a Sunday.

The dumbwaiter was raised by pulling on ropes hanging from the hoisting mechanism at the top of the building. One rope hung at the left hand of the opening into the shaft, and the other on the right hand. The counterpoise was on the left side of the shaft. The plaintiff's left arm was broken, and she testifies that in order to cause the dumbwaiter to descend she pulled on the left-hand rope, which, as she and her daughter and son-in-law persisted, was the proper rope to pull to lower the dumbwaiter. The clear evidence of disinterested witnesses was that precisely the contrary was the fact; that it was the right-hand rope that brought the dumbwaiter down, and that pulling the left one would cause it to rise. The negligence charged against the defendant was that he had permitted the rope by which the dumbwaiter was suspended to become and remain weak and unsafe. It was of course necessary to show some notice to him or state of affairs which would import notice. Accordingly the plaintiff's daughter testified that she had notified defendant two months before the accident that the rope was breaking, and her husband testified that he had given similar notice three weeks before the accident. Both described the rope as being in the last stages of dilapidation. It was shown by competent, persuasive and almost convincing evidence that a new rope had been put in on February twenty-eighth, about five weeks before the alleged accident, and that it was still in place and in use at the time of the trial. After a careful reading of the whole evidence we are persuaded that the verdict should not be allowed to stand, and that the motion to set it aside should have been granted.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MEYER
Yoscow, Appellant.

First Department, January 11, 1907.

Crime — murder in the second degree — conviction sustained.

Evidence in a prosecution resulting in a conviction of murder in the second degree considered and judgment affirmed.

APPEAL by the defendant, Meyer Yoscow, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 27th day of May, 1904, convicting him of the crime of murder in the second degree, and also from two orders respectively denying the defendant's motions for a new trial and in arrest of judgment.

Lewis Stuyvesant Chanler, for the appellant.

Robert C. Taylor, for the respondent.

SCOTT, J. :

The appellant was convicted of murder in the second degree in the Court of General Sessions of the Peace. The case is barren of exceptions raising any question of law. The appellant bases his appeal upon the contention that, on the whole, the defendant's evidence was more worthy of belief than that of the People, and upon the further contention that the trial judge and the counsel who defended the appellant at the trial misconceived the true theory of the facts upon which the defense should have been predicated.

The defendant kept a billiard or pool room on Third avenue, which was apparently frequented by young men and boys of the character commonly known as "tough." The deceased frequently resorted to the saloon and on occasions had been riotous and destructive, breaking the pool tables and implements of the game. On the night of the shooting Flynn, the man who was killed, had played pool in the room, and had gone out leaving his overcoat behind him. Later he returned for his coat and the shooting then took place.

The story told by the People's witnesses was that while Flynn had been out of the room two men named Casey and Luizzi had

come in and commenced playing pool at the table nearest the entrance; that Flynn passed them in going to the back of the room for his overcoat, and was obliged to re-pass them in order to leave the room; that he had put on his coat and was going out when Luizzi struck him on the head with the heavy end of the cue, saying that he had waited for him (Flynn) and was going to fix him; that Flynn fell and Luizzi beat and kicked him, and that the defendant then came up and either kicked or jumped on Flynn and shot him as he lay on the floor. Some of the witnesses say that defendant spoke to Flynn, saying in effect that the latter had wrecked his place and that he (defendant) would fix him. This general story of the shooting was told by a number of witnesses who were present. The defendant told how Flynn wrecked the room on a previous evening, and had done other damage, and that he and Flynn had had some words about it; that on the night of the homicide, immediately before it occurred, he was standing in the front of his room talking to some young men when Flynn came in; that he asked Flynn why he did not stay away, to which the latter returned a rough reply; that shortly afterwards a sudden row broke out in the saloon and he rushed to the back of the room and took a revolver out of a box; that as he went some of the men present tried to strike him; that he heard threatening cries directed towards himself; that after he had procured the revolver he went again to the front of the room, and as he did so a young man named Savarese was pushed against him; that he hit Savarese with the revolver and saw Flynn coming towards him threatening him; that he was about to strike again at Savarese when the revolver went off and the next thing that he saw was that Flynn lay upon the floor.

He denied that he had shot Flynn while he lay on the floor, or that he had aimed the revolver at Flynn at all, or that he had either kicked Flynn or jumped on him. He was corroborated to some extent by his brother, and there was evidence of his previous peaceable reputation. The testimony presented a sharp conflict as to how the shooting came about, and the jury were certainly entitled to believe, as they evidently did, the account given by the People's witnesses. As to the supposed misconception of the true theory of defense on the part of the court and counsel we have been unable to discern it. The view of the case insisted upon by

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the counsel at the trial was that defendant had been put in such danger as to his person and property as to justify him in arming himself with a view to protecting himself; that he was justified in using such force as was necessary to effect that end, and that the pistol went off unintentionally or accidentally while he was defending himself with it by using it as a club.

Counsel developed this theory of defense by a series of requests to charge which were not only accepted and charged by the court, but were charged before the general charge was made, thus giving the jury at the very outset the defendant's theory of his defense couched in the language of his counsel. Of course the presentation of this defense rendered it proper that the court should instruct the jury as to when and under what circumstances a man may resort to violent and deadly means for his self-protection, and this the learned judge did temperately and accurately. Upon the whole case we are of the opinion that the defendant had a fair trial; that the testimony offered on behalf of the People was such as the jury was justified in believing, and that, being believed, it amply supported the verdict.

The judgment must be affirmed.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment affirmed. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD LEACH,
Respondent, v. CENTRAL FISH COMPANY, CARLTON M. PRANKARD,
as President, and EDWARD M. DIXON, as Secretary and Treasurer
Thereof, Appellants.

First Department, January 11, 1907.

Corporation — inspection of corporate books — director's right to
inspection.

Even though a stockholder's right to inspect the corporate books may be denied in the discretion of the court, the right of a director to such inspection is absolute, being necessary to enable him to perform the duties of his office. To enable a director to secure such inspection he need only show that he is a

director and has demanded permission to examine the books and has been refused.

It is no answer to say that such director is, pursuant to the by-laws, the representative of a certain stockholder who is inimical to the corporation. If the director's hostility is such as to justify his removal from office, this should be accomplished by the proper method.

APPEAL by the defendants, the Central Fish Company and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of October, 1906.

Frank Harvey Field, for the appellants.

George Zabriskie, for the respondent.

SCOTT, J. :

The relator, a director of the appellant corporation, has obtained an order directing the issuance of a peremptory mandamus permitting him to examine the books, records and accounts of the said corporation. From this order the defendants appeal. It appears that the Central Fish Company was formed in the year 1902, between certain persons engaged in the fresh-water fish business in the city of New York, including W. Vernon Booth, president of an Illinois corporation known as A. Booth & Co., which maintained an agency in the city of New York, at which it conducted a fresh-water fish business.

The consideration upon which Booth was admitted to the defendant corporation and given a part of the stock, was his agreement that he would procure a bill of sale of its New York agency from A. Booth & Co. to the defendant corporation, and should further procure for A. Booth & Co. an agreement not to engage in the fresh-water fish business in the city of New York for a period of ten years. These papers (the assignment and the agreement) were executed by A. Booth & Co., but owing to some pending litigation with third parties have not been delivered to the defendant corporation, being held in escrow by a trust company. By the agreement under which the Central Fish Company was organized it was stipulated that the business of the company should be conducted by four directors, and that any interest or combination of interest of not less than one-fourth of the capital stock should have the right to name one of

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the directors, and that the interest represented by W. Vernon Booth should name the vice-president. The by-laws carried out this agreement and provided that one of the directors should be named by and should immediately represent the interest of W. Vernon Booth as long as he, the said W. Vernon Booth, should remain a stockholder of the corporation. The relator is the director nominated by and immediately representing the interest of said Booth. The respondent sets forth at length certain facts which, as it claims, demonstrate that W. Vernon Booth has become inimical to the Central Fish Company and desires to damage and destroy its business, and it is asserted that the only purpose for which relator seeks to examine the books and records is to facilitate Booth in the prosecution of his policy of destruction. We are referred to a number of cases in this State wherein it has been held that the right of a stockholder to examine the books and papers of a corporation is not absolute, but rests in the sound discretion of the court, and that that discretion will be exercised to refuse an application for an inspection when it is made to appear that its real purpose is to injure the corporation. (*Matter of Steinway*, 159 N. Y. 250, 265; *Matter of Coats*, 73 App. Div. 178; *People ex rel. Callanan v. Keeseville, etc., R. R. Co.*, 106 id. 349.) For the purposes of this appeal we may assume, without deciding, that the facts stated by the defendant would suffice for a refusal of the demand for an inspection if the relator claimed such right only as stockholder, or if W. Vernon Booth himself being a stockholder, but not a director, were insisting upon an inspection. The rule which is applicable to a stockholder is not applicable to a director. The duty of a director is to direct, and if he neglect this duty he is certainly guilty of a moral wrong, if not a legal one. To perform this duty intelligently it is essential that he should keep himself informed as to the business and affairs of the corporation and as to the acts of its executive officers, and in order to keep himself so informed he has the unqualified right to inspect its books, records and documents. All that he need show to entitle himself to an inspection is that he is a director of the company; that he has demanded permission to examine and that his demand had been refused. (*People ex rel. McInnes v. Columbia Bag Co.*, 103 App. Div. 208; *People ex rel. Gunst v. Goldstein*, 37 id. 550.) It is of no consequence that the relator was

put into the board of directors to represent a certain interest in the company. That fact lessens neither his obligation nor his rights. If the company by its plan of organization has so contrived that it is possible that a hostile director may become a member of the board, that does not affect the general rule as to the rights and duties of a director. If the hostility assumes such a shape and goes to such an extent as to justify his removal from the office, the law has provided a method by which that end can be accomplished, but so long as he remains a director he cannot be denied the rights appertaining to the office.

The order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

In the Matter of the Application of the LONG ACRE ELECTRIC LIGHT AND POWER COMPANY, Respondent, for Space in the Subway of the CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, Appellant.

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Municipal corporations — when municipal franchise can be sold — ratification of assigned franchise by municipality — subways in city of New York — right of electrical company to lay cables therein.

When the allegations of a petition for a writ of peremptory mandamus to obtain an allotment of space for electric wires in subways in the city of New York are positive and explicit, and are merely met by denials of knowledge or denials which do not raise issues of fact, and merely state conclusions of law, the court may consider the right to a peremptory writ without issuing the alternative writ.

When an electric lighting company holding a municipal franchise grants to an individual the "sole and exclusive right and privilege to operate for all purposes, under the franchise * * * granted * * * by the Board of Aldermen," etc., it is a complete assignment of the franchise, leaving no right or reservation in the assignor.

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While as a general proposition a corporation chartered to perform public or *quasi* public duties cannot alienate its franchise without legislative authority, yet the rule is subject to many exceptions and qualifications and the modern tendency is towards a relaxation of the rule.

The reason for the rule against the alienation of such franchise is that by divesting itself of the franchise, the corporation would disable itself from discharging its public duties, and that, therefore, the public is entitled to forbid the transfer. But the grantor of the franchise may ratify and confirm an alienation thereof although made without prior authority. This ratification need not assume any particular form, and may be evidenced by acts which recognize the validity of the assignment, and which are inconsistent with any objection thereto.

Thus, when an electric company was granted a franchise by the municipal authorities of the city of New York in 1887, giving it a right to erect poles and wires and construct and use wires and conduits over and under the streets of the city, for which compensation was made to the city, a special franchise was created, and when the grantee has assigned the same to an individual, and the right has passed by subsequent assignments to another corporation which has been allowed by the municipal authorities to erect and maintain poles and wires in said city, the acquiescence of said city is *prima facie* a ratification of the assignment of the franchise originally given and entitles such corporation to lay its wires in the conduits of the Consolidated Telegraph and Electrical Subway Company, which is required to furnish space to corporations "having lawful power to operate electrical conductors in any street, highway or public place in the city."

Moreover, such subway company is a private corporation, operating for its own gain, and is invested with no authority to grant or withhold privileges or to discriminate between lawful applicants for space in its conduits. It is vested with no governmental function and does not represent the State or city. Hence, as the question as to whether such franchise may be assigned is a matter of public concern only, and such assignment not being *malum in se*, it is not a question which can be raised collaterally by the subway company, but is available only to the municipality.

It is not held, however, that said subway company is obliged to assign space to every applicant and that it may not inquire whether the applicant has a right to enter, but it has no right to refuse an applicant having an apparent franchise acquiesced in by the public authorities.

It is not necessary for such applicant to obtain a permit from the commissioner of water, gas and electricity before applying for an allotment of space in said subways.

When such subway company bases its refusal to allot space in the conduits on the sole contention that the applicant has no lawful power to operate electrical conductors in the city, it cannot maintain that the space at present available is insufficient.

INGRAHAM and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by the Consolidated Telegraph and Electrical Subway Company from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of October, 1906, granting the petitioner's motion for a peremptory writ of mandamus.

Alton B. Parker [*Beardsley & Hemmens*, attorneys], for the appellant.

Austen G. Fox and *A. J. Dittenhoefer*, for the respondent.

SCOTT, J. :

This proceeding involves the right of the relator, an electric light company, to obtain an allotment of space for its wires in the underground conduits belonging to the Consolidated Telegraph and Electrical Subway Company (hereinafter for brevity's sake called the Subway Company). The organization of the Subway Company and its erection and maintenance of underground conduits for electrical conductors marked the culmination of the long struggle, now passed into familiar history, to compel the removal from the streets and public places on Manhattan island of the poles and wires once used for telegraph, telephone and electric light wires. The powers, duties and obligations of the respondent company are derived from and defined by two certain contracts dated respectively July 27, 1886, and April 7, 1887, between said company and the commissioners of electrical subways for the city of New York, which were ratified and confirmed by the Legislature by chapter 716 of the Laws of 1887. By these contracts the Subway Company was authorized to construct conduits for carrying wires, and among other things it was provided that the spaces in such conduits should be leased to any corporation "having lawful power to operate electrical conductors in any street, avenue, or highway in the city of New York that may apply for the same, including any company or corporation having or which shall acquire lawful power to manufacture, use or supply electricity." The contract also undertook to provide against the danger that some one company, by leasing more space than it required, should prevent other companies from acquiring space, and further provided for the building of additional conduits as they might be needed. The commissioners of electrical

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subways agreed on their part to use all lawful means to compel companies operating electrical conductors to rent space in the subways, and the Legislature, by section 3 of the ratifying act, provided that wherever the conduits had been built all poles and wires should be removed, forcibly if necessary, from public streets and places, and in point of fact such poles and wires, including those erected and operated by the predecessor in interest of this relator, were subsequently removed by the public authorities of the city. The ratifying act of 1887 also included a remedy by writ of mandamus in case the subway company should fail to perform the duties and obligations assumed by it. The present relator, claiming to be entitled to lay and operate electrical conductors in this city, has applied to the subway company for an allotment of space in the subway now constructed in Forty-second street; and has tendered payment of rental for one year in advance at the rate fixed and charged by said subway company. That company has refused to allot such space and resists the application for a mandamus upon several grounds, but chiefly relies upon the objection that the relator's company has not "lawful power to operate electrical conductors in any street." But first it says that by its answer to the petition it has raised issues of fact, and that for this reason, if any mandamus at all is to issue, it should be in the alternative and not the peremptory form. This objection is satisfactorily answered by the learned justice at Special Term (51 Misc. Rep. 407) and requires no extended discussion at our hands. As he points out, the allegations of the petition are positive and explicit in detail and are met for the most part by denials of knowledge or information, or by denials, positive in form, but which obviously put in issue not facts, but the conclusions of law arising from the facts as stated in the petition. The principal controversy arises over the denial by the subway company that the relator has any legal right or lawful power to operate electrical conductors under the streets, or has lawful power to manufacture, use or supply electricity. The right which the relator asserts, and which is thus called in question, rests upon a franchise granted by the municipal authorities of the city of New York to the American Electric Manufacturing Company in 1887. The facts under which the relator claims the right to operate under this franchise are set forth at length in the petition and are briefly as follows: The

American Electric Manufacturing Company was incorporated on March 28, 1885, under the General Manufacturing Corporation Act of 1848 (Laws of 1848, chap. 40, as amd.), which seems to have been the only appropriate act in force at that time under which such a company could have been incorporated. The purposes of said company, as stated in its certificate of incorporation, are very broad, covering "the manufacture, generation, utilization and sale of electricity," as well as the manufacture, leasing and sale of electrical apparatus and appliances, and the purchase and sale of patent rights and the like. On May 31, 1887, the board of aldermen of the then city of New York, by resolution (approved by the mayor June 13, 1887), gave and granted to the American Electric Manufacturing Company permission and authority "to locate and erect poles, and hang wires and fixtures thereon, and to place, construct and use wires, conduits and conductors for electrical purposes in the city of New York in, over and under the streets, avenues, wharves, piers, and parks therein or adjacent thereto, according to such plans as may be directed, approved or allowed by and subject to the powers of the Electrical Subway Commissioners and to the provisions of Chapter 499 of the Laws of 1885, and under the supervision of the Commissioner of Public Works and of the Department of Public Parks within their respective territorial jurisdiction, and subject also to all existing ordinances applicable thereto, and to all reasonable regulations of the privilege hereby conferred which the Common Council may hereafter impose by ordinance or otherwise." The resolution also makes provision for compensation to the city for the privilege thus conferred. This resolution constitutes the grant or franchise under which the relator claims the right to operate electrical conductors. Its title thereto is derived as follows: On April 18, 1888, The American Electric Manufacturing Company, by an instrument in writing, "granted" to Frederick E. Townsend, his executors, administrators and assigns, "the sole and exclusive right and privilege to operate for all purposes, under the franchise, privilege, permission, authority or right granted to it by the Board of Aldermen of the City of New York by a resolution adopted by the said Board on the 31st day of May, 1887," reciting the terms of such resolution. The language of this instrument is criticised as being a grant of a right under a fran-

chise, and not an assignment of the franchise itself. What was granted to the manufacturing company was the right to do certain things. That right constituted its special franchise, and was property. What was "granted" to Townsend was "the sole and exclusive right and privilege to operate for all purposes under the franchise, privilege, permission, authority or right granted to it by the Board of Aldermen of the City of New York by a resolution adopted by the said Board on the 31st day of May, 1887." In other words, the company granted or conveyed to Townsend the right, *i. e.*, the franchise, which had been given to it by the board of aldermen, and it gave him "the sole and exclusive right," reserving nothing which it could use itself or transfer to anyone else. It is not easy to see how, by any words, a more complete assignment could have been made.

On March 14, 1889, the American Electric Illuminating Company was incorporated under the act of 1848, as amended, the objects of its incorporation being the "manufacture, sale, leasing and ownership of appliances, inventions, letters patent and plant for electric light, heat, power and motion, and the manufacture, sale and transmission of electric light, heat, power and motion." To this corporation, by a paper dated April 19, 1889, Frederick E. Townsend gave, granted, sold, assigned, transferred and set over "any right, title and interest I have and hold or may have and hold, as trustee for such American Electric Illuminating Company, or individually in and to and under the paper writing and assignment dated April 18th, 1888, made by the American Electric Manufacturing Company, a company duly organized under the laws of the State of New York, unto me, and the rights, permission, privilege, franchise and authority therein referred to." The American Electric Illuminating Company proceeded to operate under this franchise to the extent that it established a generating plant, erected poles and strung wires, and for more than a year manufactured electricity and supplied it to customers. Its poles and wires were then cut down and removed by the public authorities, and its business, or the major part thereof, was thereupon suspended. In 1897 a judgment creditor began sequestration proceedings against the company which resulted in the appointment of a receiver, and the sale by him, under the order of this court, of the franchise to carry on busi-

ness in the city of New York. The purchaser on such sale was one Martin Minturn, and the sale to him was duly confirmed. The relator was incorporated on April 23, 1903, under the Transportation Corporations Law (Laws of 1890, chap. 566, art. 6, as amd.), with ample powers, so far as concerned its certificate of incorporation, to generate, sell and distribute electricity, and to construct, maintain and operate conductors therefor. On March 21, 1906, Martin Minturn, by an instrument in writing, gave, granted, sold, assigned, transferred and set over to the relator any and all his right, title and interest of every nature and kind in and to and under the above-described franchise. The respondent, relying upon that clause of its contract which requires it to furnish space in its conduits only to companies having "lawful power" to operate electrical conductors in New York city, defends its refusal to accord space in said conduits to relator by the contention that said relator has not such lawful power, and owns no franchise to operate such conductors, granted either by the Legislature or the municipal authorities or any other body competent to grant such a franchise. The relator's title to the franchise under which it claims the right to operate and the history of which has been given, is questioned because, as it is said, the American Electric Manufacturing Company could not assign to Townsend the franchise granted to it by the board of aldermen, and consequently Townsend took nothing under the attempted assignment to him, and could convey nothing to his assignee, the American Electric Illuminating Company. This contention is based upon the general proposition that a company chartered to perform duties of a public or *quasi* public nature cannot without legislative authority alienate or convey away its right to perform such duties, or the property necessary to their performance. In support of this general proposition there are cited to us numberless extracts from text books and judicial opinions. That there is such a rule of law is not open to question, but like most general rules, it is subject to exception and qualification both as to its applicability to specific cases and as to the persons who may invoke it. It remains, therefore, to consider whether or not it is applicable to the circumstances of the present case, and whether or not, in any event, it may be invoked by this respondent. The American Electric Manufacturing Company derived its primary franchise to be a corpora-

tion directly from the Legislature, and with it the power to engage, as a corporation, in the various kinds of business specified in its certificate of incorporation. The right thus conferred involved no public or *quasi* public duty. The secondary or special franchise to operate a line or lines of electrical conductors, which is the only franchise involved in this proceeding, was granted by the board of aldermen, the proper municipal authority to make such grant. (*West Side Electric Co. v. Consolidated Tel. Co.*, 110 App. Div. 171.) The general rule that a special or secondary franchise is inalienable without express legislative assent has lost practically all its authority in this State. From early days railroad corporations have had legislative authority to transfer to other railroad corporations the special privilege of operating the road (*Woodruff v. Erie R. Co.*, 93 N. Y. 609, 616), and all other stock corporations were accorded that right by chapter 638 of the Laws of 1893 (adding to Stock Corp. Law [Laws of 1892, chap. 688] § 33), which has been since amended by chapter 130 of the Laws of 1901. The relaxation of the general rule is undoubtedly due to the freedom with which corporate charters are now given, and to the universal recognition of the property nature and value of special franchises. A special franchise is generally accompanied by the grant of the right to use or occupy public property, or to exercise the essentially sovereign power to acquire property by eminent domain, and the consideration for the grant is found in the *quasi* public service to be rendered. The reason for the rule against alienation of such a franchise is that, by divesting itself of the franchise, the corporation would disable itself from discharging the public duties for which it had been chartered, and the public has, therefore, been considered as entitled to forbid such a transfer. When a charter can be obtained by merely executing and filing a certificate, as was the case when the Electric Manufacturing Company was organized, and the exercise of the special franchise carried with it the public obligation, the reason for the rule largely disappears, especially where, as in the case of a manufacturing company, the sale and distribution of electricity was only a part of the objects for which the company was incorporated. Whether or not a special franchise be availed of, and by whom it is availed of, is solely a question of public concern. It is not questioned that the grantor of a special privilege might, as a

condition of its grant, attach the quality of assignability to it, and the same power which conferred the franchise may ratify and confirm the alienation thereof when attempted to be effected without precedent authority. (4 Thomp. Corp. § 5361; *Shaw v. Norfolk County Ry. Co.*, 5 Gray [Mass.], 162; *Richards v. Merrimack, etc., R. R. Co.*, 44 N. H. 127.) It is not essential that such ratification shall assume any particular form. It is sufficient if it be evidenced by acts which recognize the validity of the alienation or assignment, and are inconsistent with any objection thereto. The franchise was granted by the board of aldermen, not as individuals, but as the proper local authority to act in that regard as and for the municipality. The grant was, therefore, a grant from the city, the owner of the streets, for the use and benefit of the public. It was the city, therefore, the grantor of the franchise, which had the power to consent to and ratify the assignment of the franchise. The record shows that the American Electric Illuminating Company, claiming and owning no better right to do so than the franchise in question and the title thereto through the assignment to Townsend, did in fact erect poles in the streets of the city and string wires thereon and supply electricity to its customers by means of such poles and wires, and continue to do so until the completion of respondent's subways and the forcible removal by the public authorities of all the poles and overhead wires then maintained in the more populous section of the city in Manhattan island. Unless the American Electric Illuminating Company had municipal authority to erect poles and string wires, these structures constituted illegal obstructions which it was the duty of the municipal authorities to remove. We are not to presume that public officers willfully fail to do their duty, and in view of the acute public and official opposition at that time to the maintenance of overhead wires we should find it difficult to believe that the public authorities stood by and permitted a wholly unauthorized company to add to the unsightly structures then generally condemned and permitted the company to expend its money in erecting such structures. Of course, we do not intend or undertake to pass upon any question that may arise between the city and the relator, but the acquiescence of the city in the acts of the illuminating company appear to indicate, *prima facie*, a ratification of and consent to the devolution upon that company of the title to the franchise originally given to

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the manufacturing company, and if the illuminating company, when its poles and wires had been cut down, had at once applied for space in the subway, we much doubt whether it could have been denied. If it had a right to entrance then it does not appear that its right has been lost by anything that has transpired since.

We are next brought to consider whether the respondent is in a position to call into question the validity of the relator's title to the special franchise in question. The respondent is a private corporation, operating for its own gain. The contracts between it and the commissioners of electrical subways, as well as the act ratifying these contracts, are replete with provisions designed to prevent the monopolization of the subways. The respondent is invested with no authority to grant or withhold privileges or to discriminate between rival applicants for space in its conduits. It is vested with no governmental functions and represents in no sense the public, either of the State or the city. Whether or not a special franchise may be assigned is a matter of public and not of private concern. Such an assignment is not *malum in se*, and the only ground for ever questioning the assignability of such a franchise is that the public were interested in its exercise by the original grantee. Accordingly it has been held that only the public may question the validity of an attempted assignment, and that it is not a question to be raised collaterally or by any private individual. (4 Thomp. Corp. § 5367; *Oakland R. R. Co. v. Oakland, etc., R. R. Co.*, 45 Cal. 365; 13 Am. Rep. 181.) A similar rule has uniformly been applied as to the right to question the validity of a company's incorporation, a closely analogous question. Thus, where an attempt had been made to create a corporation by papers with the color of law, but so far defective in execution that they would be held, in a direct proceeding, to be defective and ineffectual, and the corporation has exercised its corporate powers, it is well established that the corporation is safe from collateral attack by any person by reason of its defective incorporation, and can be directly attacked only by the State. (*Lamming v. Galusha*, 81 Hun, 247; *Buffalo & Allegany R. R. Co. v. Cary*, 26 N. Y. 75; *Eaton v. Aspinwall*, 19 id. 119.) The relator stands in this precise position. It holds the franchise to operate under a formal assignment from the original grantee, and its predecessor in title, holding under the same assign-

ment, actually exercised the privilege conferred by the franchise. We do not, of course, hold that the respondent is obliged to assign space in its conduits to every one who may apply, or that it may not, before assigning such space, inquire whether the applicant has a right to enter, but we are of opinion that when application is made by a corporation having apparent right to a franchise, and which has actually, with the acquiescence of the public authorities, exercised the franchise, the validity of its right and title is not open to collateral attack. If, for any public reason, there is a doubt as to the validity of the title, that question can be raised by the proper municipal authority when application is made for a permit. If not then raised, the question is of no concern to the respondent. That the franchise was assigned in the first instance to an individual does not suggest any defect in the chain of title. We are not aware of any statutory or inherent reason why the right to construct and maintain electrical conductors may not be conferred upon an individual, and none has been suggested. At all events, Townsend, the assignee, never attempted to use the franchise, but seems to have served merely as a conduit through whom the franchise passed from one company to another. Such a method of transfer is not invalid. (*Parker v. Elmira, C. & N. R. R. Co.*, 165 N. Y. 274, 280.) Before actually stringing its wires, it is necessary that relator shall have not only an allotment of space, but also a permit from the commissioner of water supply, gas and electricity. It seems to be quite unimportant which is applied for first, and would be of no importance whatever were it not for the rules made by the commissioner of water supply, gas and electricity governing such application. These rules cover both applications for leave to construct subways and for leave to enter subways already constructed. As to the latter, rule 3, read upon the motion, is applicable. It is subdivided into two parts, designated (a) and (b). Subdivision (a) requires that application for space must be made to the subway company, and certain particulars given. Subdivision (b) reads as follows: "When applications have been made, and space assigned for conduits underground, the written consent of the commissioner must be obtained before any conductors are placed in the space so assigned." If the relator had applied to the commissioners before it obtained an allotment of space, its application might well have

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been, and doubtless would have been, refused under this rule. The unverified letter of the deputy commissioner that a contrary rule has obtained in practice cannot be considered in contradiction of the plain letter of the rule. It is also suggested that the special franchise itself requires certain plans to be approved before the franchise can be operated. The grant was of the right to erect poles and hang wires thereon, as well as to place wires underground, and provided that all should be done "according to such plans as may be directed, approved or allowed by and subject to the powers of the Electrical Subway Commissioners." If the relator were applying for leave to construct conduits for its wires it would undoubtedly be required to construct them under approved plans, but this is not what it asks. It wishes to draw wires through conduits already constructed according to plans which have been directed, approved and allowed by the subway commissioners, which is precisely what the franchise calls for. It is stated in an affidavit included in the papers read in opposition to the motion that there are not sufficient subways constructed in the locality requested by the relator, and that if this application were granted additional subways would necessarily have to be constructed, for which, under the statute, the relator would be obliged to give a bond. It is not asserted that any such bond has been demanded, and it is made quite clear that the respondent does not rely upon this objection to relator's application, because it is stated in the same affidavit, made by respondent's superintendent, that "the *sole* reason why the respondent has refused to comply with the request of the relator is that neither has the relator been duly authorized to conduct the electric light business in the City of New York either by legislative act or administrative act, nor is the respondent empowered by law to allot space to it in its subways upon the application made," and in the formal answer by respondent to relator's petition it is not alleged, as a reason why the mandamus should not issue, that there are no available ducts. Hence, the existence of available ducts is not put in issue. In any event, the commissioner of water supply, gas and electricity has power to order new conduits to be constructed, and it appears by his own rules that he will do so when and if he is satisfied that the unused facilities of existing subways are insufficient to meet existing requirements.

We are of opinion that, as against the respondent, the relator has established its right to the allotment of space in the conduits, and the order appealed from is, therefore, affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., and CLARKE, J., concurred; INGRAHAM and LAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

The relator has obtained a peremptory writ of mandamus requiring the Consolidated Telegraph and Electrical Subway Company to grant to the Long Acre Electric Light and Power Company space in its subway ducts for the placing of the electrical conductor therein, extending through various streets in the city of New York. The proceeding was instituted by an order to show cause based upon affidavits and a peremptory writ was granted upon motion. To entitle the relator to writ of mandamus it must show by undisputed facts a clear legal right to the relief demanded. (*People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360.)

If any question of fact upon which the relator's right to relief depends is presented, or if there is a serious doubt about its legal right to such relief, the peremptory writ should be denied and an alternative writ granted. I think upon the facts as they appeared before the court below the relator had not a legal right to the relief that it asks for. The relator's claim is as the owner of a franchise granted by the board of aldermen to the American Electric Manufacturing Company. It appeared that the American Electric Manufacturing Company was incorporated under the Manufacturing Corporation Act of 1848. (Laws of 1848, chap. 40, as amd.)

On the 31st day of May, 1887, the board of aldermen passed a resolution by which permission and authority were granted to the American Electric Manufacturing Company to locate and erect poles and hang wires and fixtures thereon, and to place, construct and use wires, conduits and conductors for electrical purposes in the city of New York in, over and under the streets, avenues, wharves, piers and parks therein specified according to such plans as may be directed, approved or allowed by and subject to the powers of the electrical subway commissioners and subject to the provisions of chapter 499 of the Laws of 1885, and under the supervision of the

commissioner of public works and of the department of public parks, within the respective territorial jurisdictions. Nothing seems to have been done under this resolution by the American Electric Manufacturing Company; but on the 18th day of April, 1888, there was executed an instrument by which the American Electric Manufacturing Company granted unto one Townsend, his executors, administrators and assigns, "the sole and exclusive right and privilege to operate for all purposes under the franchise, privilege, permission, authority or right granted to it by the Board of Aldermen of the City of New York, by a resolution adopted by the said Board on the 31st day of May, 1887, to locate, erect and set up poles and hang wires and fixtures thereon, and to place, construct and use wires, conduits and conductors for electrical purposes in the City of New York, in, over and under the streets, avenues, wharves, piers and parks therein or adjacent thereto, according to such plans as may be directed, approved or allowed by and subject to the powers of the Electrical Subway Commissioners, and to the provisions of Chapter 499 of the Laws of 1885." Subsequent to the execution of this instrument on the 14th day of March, 1889, there was incorporated under the Manufacturing Act of 1848, as amended, the American Electric Illuminating Company, and on the 19th day of April, 1889, Townsend assigned and transferred to this corporation "any right, title and interest I have and hold or may have and hold as trustee for such American Electric Illuminating Company, or individually in and to and under the paper writing and assignment, dated April 18th, 1888, made by the American Electric Manufacturing Company, a company duly organized under the laws of the State of New York, unto me, and the rights, permission, privilege, franchise and authority therein referred to." It appeared that subsequent to the execution of the instrument by Townsend and in and about the year 1889, the American Electric Illuminating Company, in the regular course of its business, duly installed an office and an electric lighting station at 426 East Twenty-fifth street, borough of Manhattan, in the city of New York, and within said building it installed and operated a complete electric light producing equipment, and in and upon certain streets in the city of New York it strung wires and poles, some of which were erected and owned by it and others had been formerly erected and used by the East River Electric Light

Company and the Thomson-Houston Electric Light Company, and by means of such electrical equipment it supplied to the public electric light under its franchise, grant, permit, license and contract to the full extent for which its facilities were equal, and continued so to do for a period of more than one year thereafter, and until its poles, wires and lamps, together with the poles, wires and lamps of other companies in the city of New York, were cut down and removed by order of the board of electrical control and the commissioner of public works. It is also alleged that by such action on the part of the city of New York the American Electric Illuminating Company was injured and its property destroyed, and there being no electrical subways in that section of the city of New York at that time it became incapacitated from furnishing its customers in said streets and avenues with electricity for light and all other purposes. Subsequently, and in the year 1897, judgment was obtained against this company. A receiver was appointed who sold out all the property and rights of the company, and the rights thus sold were acquired by the relator. So far as appears, the relator simply holds whatever right it acquired under the sale by the receiver of the property, franchise, and rights of the American Electric Illuminating Company.

I think there is a serious doubt as to the right of this relator to the franchise granted by the city of New York to the American Electric Manufacturing Company. Assuming that that company was in possession of a legal franchise to use the streets of the city of New York for its wires, conduits or conductors, it never formally assigned such franchise to Townsend. I know of no power of the holder of a franchise to grant to an individual a new franchise. While it may be assumed that the owner of a franchise, unless in some way restricted, can assign its franchise, so that when the assignee has constructed the necessary appliances to use the franchise, his right to operate the franchise will not be interfered with, it does not appear that the owner of a franchise would be authorized to grant to another the right to use the franchise. The American Electric Manufacturing Company by this instrument did not divest itself of the franchise. If it could grant to Townsend the right to exercise the franchise I can see no reason why it could not give a similar grant to any other person and thus grant franchises

If such a grant would be sufficient to confer upon the grantee a right to use the franchise granted, there would apparently be two persons authorized to use the franchise, and this might be indefinitely extended to as many persons as the original grantee should desire. What, as I view it, the board of aldermen granted, assuming that their grant was valid, was the power to this corporation, organized under the laws of the State, to exercise a certain franchise. Certainly that corporation had no authority to grant sub-franchises to individuals or corporations to use the streets of the city of New York without the consent of the State or city.

I also think that this relator is not now in a position to exercise any franchise, even assuming that it had acquired the franchise granted to the American Electric Manufacturing Company. It is not claimed that this relator has acquired the property or plant which the American Electric Illuminating Company operated in the year 1889, or that that plant has been in existence, or can be used by the relator. It claims to have acquired under a sale by a receiver whatever right the American Electric Illuminating Company had at the time that the sequestration proceedings were instituted. Now, the only authority granted by the resolution of the board of aldermen was to place, construct and use wires, conduits and conductors for electrical purposes in, over and under the streets, avenues, wharves and parks "according to such plans as may be directed, approved or allowed by and subject to the powers of the Electrical Subway Commissioners." Before this company, or any one having acquired the right of this company to exercise such a franchise, would exercise it, the "plans" must be approved or allowed by the board of electrical control, or those public officers who have succeeded to its duties. It is not given any right to use the streets of New York, except in accordance with plans so approved; and until such plans are approved no right exists under the resolution to use the streets or operate the franchise. It appears that no such plans have been prepared or approved; and that the relator is not in a position to exercise the franchise, and, therefore, it seems to me that the relator having no authority when the application was made to use the franchise, no mandamus could be granted. I think this defendant was entitled to insist that before a mandamus should be granted the relator should show a clear legal right to use the streets

of the city of New York under the franchise granted by the board of aldermen. It appears in opposition to this motion that there are no unoccupied ducts in the streets through which the relator seeks to place its electrical conductors. Under its contract with the city of New York, which has been ratified by the Legislature, the defendant is bound to construct ducts in the streets, if unoccupied ducts do not exist, when demanded by any corporation or individual entitled to use the streets of the city for electrical conductors. If this mandamus is granted this corporation will be compelled to construct for the use of the relator electrical conductors, although it does not appear that the relator is authorized to use the ducts when constructed, or will ever be authorized to exercise the franchise to furnish electricity to the public. The rules of the commissioner of water supply, gas and electricity, who has succeeded to the powers of the board of electrical control, apply only to the permission of a person authorized to use the streets, and have no application to the approval of the plans for the exercise of franchises, which, as I read the resolution of the board of aldermen, constituted a condition precedent to the exercise of any franchise. But these rules seem to contemplate an application to the commissioner before the defendant can be required to supply ducts. Rule 1 provides that no wires, cables or other electrical conductors shall be placed in any subways, conduits or ducts now constructed, or hereafter to be constructed, without the written consent of the commissioner of water supply, gas and electricity being first obtained, and that whenever any duly authorized corporation or person desires or is required to place electrical conductors underground, application must be made to the commissioner of water supply, gas and electricity on forms provided for that purpose for such accommodation as may be desired, and if the commissioner acts upon such application favorably, he will issue the necessary authorization in the event that the unused facilities of existing subways are insufficient to meet legitimate requirements, and provision is then made for the construction of electrical subways and for the application for space in the subway, to be made to the subway company; and it is then provided that when application has been made and space assigned for conduits underground, the written consent of the commissioner must be obtained before any conductors are placed in the space so assigned. Under these rules it

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would appear that the right to use the streets must first be approved by the commissioner, and the right to apply to the subway company must be predicated upon such approval by the commissioner. To say that the court can grant a mandamus to the subway company, requiring it to allow a corporation space in its subway before the commissioner has acted favorably upon an application for a permit for the use of the streets underground, seems to me to be a violation of these rules.

I do not think, therefore, that this relator is in a position to ask for this mandamus, and that the court below should have denied the application.

LAUGHLIN, J., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

OTTO C. SCHRADER, Appellant, v. RICHARD H. FRAENCKEL,
Respondent.

First Department, January 25, 1907.

Master and servant — contract of employment not to be performed in one year — Statute of Frauds — when servant may recover on executed contract although not in writing — when plaintiff suing on quantum meruit not entitled to recover percentage of profits.

It seems, that although a contract for services not to be performed within one year is not in writing, the employee may recover on such contract so far as it has been executed.

But when at trial the plaintiff amends his complaint, which was originally on contract, so as to base his actions solely upon *quantum meruit* for services rendered, he cannot recover upon the contract fixing the value of services.

Although the contract as proved in such action might have entitled the plaintiff to a certain percentage of the net profits, yet when it is found as a fact that the moneys actually paid the plaintiff were full compensation for his services, there can be no recovery of a percentage of the net profits in an action for a *quantum meruit*.

Where it appears that the net profits of the business on which the plaintiff was to receive a percentage for his services were to be figured by charging the plaintiff's salary as an expense, according to a recognized custom of the business, and the plaintiff accepted payments on that basis, that method of figuring the net profits must prevail.

HOUGHTON, J., dissented, with opinion.

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APPEAL by the plaintiff, Otto C. Schrader, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of March, 1906, upon the report of a referee dismissing the plaintiff's complaint.

L. E. Warren, for the appellant.

James Allison Kelly, for the respondent.

INGRAHAM, J. :

The complaint alleges an agreement made on or about January 1, 1900, by which the defendant employed the plaintiff as a salesman, and agreed to pay for the services to be by him rendered fifteen per cent of the profits of said business during each and every year that the plaintiff should remain in the defendant's employ, and the defendant guaranteed that the plaintiff's fifteen per cent of said profits should not amount to less than \$4,000 per annum, and that any excess over and above the said \$4,000 should be paid to the plaintiff at the end of each and every year, or at such time as the plaintiff and the defendant should terminate said agreement; that in pursuance of said agreement, the plaintiff, on the 1st day of January, 1900, entered into the defendant's employ and continued in such employ under said agreement from January 1, 1900, to December 31, 1903; and that the amount of fifteen per cent of the said net earnings was in excess of that actually paid to the plaintiff; and the complaint alleges upon information and belief that the fifteen per cent of the profits of the said business amounted to \$36,000, and demanded judgment for the sum of \$20,000.

The answer denied all the allegations of the complaint and then alleged that any agreement under and by virtue of which the plaintiff was and remained in the employ of the defendant was not to be performed within one year from the making thereof, and that the agreement was not in writing and, therefore, was void under the Statute of Frauds; and it was further alleged that for the services rendered by the plaintiff he had been fully paid.

On the trial the plaintiff moved to amend the complaint by alleging that the contract was made in the month of November, 1899, to commence on January 1, 1900, and to continue for a period of

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one year, or for a longer period, if both the plaintiff and defendant so desired, and by inserting the allegation that the services so rendered were reasonably worth the sum of \$36,000. The referee stated to counsel for the plaintiff that "In the event of the court allowing the amendment which has been moved by you, is the theory of your action one to recover the reasonable value of the services rendered by the plaintiff, or do you sue to recover the contract price as such?" Whereupon counsel for the plaintiff stated: "I sue to recover the reasonable value of services." By the referee: "And the theory of your recovery would be the *quantum meruit*?" To which the plaintiff's counsel answered, "Yes," and the motion to amend the complaint was then granted. The trial then proceeded, the plaintiff introducing evidence that the value of the plaintiff's services was from \$8,000 to \$12,000 a year. The evidence given on behalf of the defendant was that the plaintiff's services were worth from \$2,000 to \$3,000 a year. The plaintiff's testimony as to the contract was that the defendant offered the plaintiff fifteen per cent of the profits of the business, the plaintiff to have the drawing account, the amount of which was not stated, and that the plaintiff stated that he would think it over; that the next day the plaintiff told the defendant that he would accept the proposition, but the drawing account was to be \$4,000, and to that the defendant agreed; that this conversation was in November, the contract to begin on the 1st of January, 1900, and that on the 1st day of January, 1900, he commenced under the contract and continued for four years. The defendant testified that he offered to give the plaintiff \$3,000 per year and a chance to make more, giving him fifteen per cent of the net profits; that the plaintiff said that he would like to have the amount of \$4,000 sure, and the defendant replied, "in a good year, you will make less if the sum is \$4,000 than with \$3,000, because whatever amount we fix upon will be charged to expense account." The plaintiff said that he did not mind, that he wanted \$4,000; that he would rather have \$4,000 sure; that the defendant then said: "I will, of course, make my balance sheets as I have always; as I have always done heretofore."

The referee found that early in November, 1899, defendant, by a verbal agreement, employed plaintiff as a salesman, his services to begin January 1, 1900, and to continue a year or longer at a salary of \$4,000 per year, and so much of fifteen per cent of defendant's

net profits as might exceed that sum in any year, estimated as the defendant had always estimated net profits in the past, and the plaintiff's salary to be charged to the expense account of the business in estimating net profits. He further found that the plaintiff commenced his employment with the defendant under his contract on the 1st day of January, 1900, and continued to December 31, 1903, and was paid by the defendant \$4,000 in the year 1900, and \$4,500 in each of the following years, making the total amount paid for the four years' services \$17,500; that during these four years the plaintiff accepted what was paid without objection, and without a request or demand for more; that on the 1st day of January, 1904, the defendant formed a copartnership, and the plaintiff continued with the new firm at a salary of \$2,500 a year, without commission or share in the profits, which he accepted without effort to better his position elsewhere, and finally left the employment in this copartnership in July, 1904; that the reasonable value of the plaintiff's services during the four years of employment by the defendant was not more than the amount actually paid to him during that time; that fifteen per cent of the net profits of the business, made up as the defendant had been in the habit of making up his accounts, was \$14,939.04; that in making up these accounts the defendant had charged as an expense to the business interest on the capital invested in the business the sum of \$36,418.38, fifteen per cent of which would have been \$5,462.75; and in estimating the net profits the amount of \$17,500 paid to the plaintiff under this contract was also charged as an expense, fifteen per cent of which would be \$2,625; and the plaintiff claims that these two amounts should be added to the \$14,939.04 on account of his fifteen per cent of the net profits; that in each of the years 1901 and 1903 the defendant made a statement to the plaintiff as to the net profits during the year, which showed that fifteen per cent of the net profits was something more than the \$4,000 that plaintiff had been paid, and that the defendant stated that he would make the amount of the plaintiff's interest \$4,500 a year, which was accepted by the plaintiff without objection, and that in the year 1902 the amount of the fifteen per cent net profits was less than \$4,000; but that the defendant stated to him that he would make the amount the same as the year before, viz., \$4,500, which the plaintiff accepted without

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objection; that the methods by which these net profits had been arrived at, namely, the charge of interest on capital invested, and the amount paid the plaintiff on what he called his drawing account, was charged as a part of the expense of the business, appeared upon both the journal and ledger of the defendant's business during the whole period of the plaintiff's employment and that during the whole period of plaintiff's employment he had free and unrestrained access to and liberty to examine all of the defendant's books of account, and he did examine them.

The referee also found that in December, 1902, S. S. Fritz owed the defendant something over \$18,000, and that there was a settlement of that indebtedness made by which S. S. Fritz paid to the defendant one-half cash and one-half preferred stock of the S. S. Fritz Manufacturing Company, organized to continue the business of S. S. Fritz; that the stock given to the defendant was of the par value of \$9,000; that this company continued to deal with the defendant, and subsequently, in the year 1903, it owed the defendant over \$37,000, the greater portion of which was long overdue and which the defendant was unable to collect; that he continued business with this corporation, and from time to time made collections from it, but that at the time of the trial the corporation still owed him over \$23,000, which was overdue and which the defendant was unable to collect; that this stock paid one year a dividend of six per cent, but had paid no other dividends; and in the year 1903 the defendant marked its stock off as valueless and it was not considered in estimating the amount of net profits to which the plaintiff would be entitled.

The defendant testified that he considered the stock valueless, and that he had endeavored to sell it without being able to obtain a bid of twenty-five per cent of its par value. Assuming that this stock was worth twenty-five cents on the dollar, which would be the highest price that it could be estimated at, it would be of the value of \$2,250, the fifteen per cent to which the plaintiff would be entitled would be \$337.50. The total amount of the net profits, therefore, according to the plaintiff's claim, would be \$14,939.04; the amount of the plaintiff's fifteen per cent of the net profits according to the balance sheets made up by the defendant, \$8,037.75; fifteen per cent of the amount charged for interest on the defend-

ant's capital invested in the business, \$2,625; fifteen per cent of the amount paid to the plaintiff for his drawing account, and \$337.50, his proportion of the value of this \$9,000 stock of the S. S. Fritz Company, making in the aggregate \$25,979.29, of which there has been paid \$17,500.

The referee found, as a conclusion of law, that the contract between the plaintiff and the defendant was void under the Statute of Frauds; that the plaintiff having failed to establish that the services rendered by him were worth more than the amount paid to him by the defendant, the plaintiff was not entitled to recover in the action; and that, as all the material issues in the action had been resolved in the defendant's favor, he was entitled to judgment dismissing the complaint, and for the costs of this action.

The referee, in his opinion, held that a contract void under the Statute of Frauds could not be considered as proof of the value of the services rendered in pursuance of such a contract; and that the contract relied upon by the plaintiff could not be considered as determining the value of the defendant's services rendered under it; and he, therefore, disregarded the agreement and the evidence in connection therewith. But for the amendment of the complaint on the trial, I think the plaintiff would have been entitled to recover under the contract.

In *Adams v. Fitzpatrick* (125 N. Y. 124) the contract was made on October 15, 1885, at the rate of \$3,000 per annum, to work from that time until November 1, 1886. The plaintiff commenced the services and continued to labor in the employ of the defendants until May, 1887, when he was discharged. The referee found that the terms of employment were from the 16th day of October, 1885, to the 1st day of November, 1886, at an agreed salary of \$3,000 per year; that after the expiration of this term he continued in the employ of the defendants, rendering like services and receiving a like salary, without any other or further agreement between them as to the hiring or the terms thereof. In speaking of the contract the court said: "It is true that the original contract, so long as it remained executory, was void and unenforceable; but having been voluntarily performed by both parties, neither could afterwards be heard to allege its invalidity, and it controlled the terms of service and compensation under it, as against both parties, as well as

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afforded an authority from which the intention of the parties in relation to a further contract could be inferred. In other words, after execution it was to all intents valid."

It was further held that the evidence clearly authorized a finding of a renewal of the contract for one year, and that this applies as well as to the rate of compensation as to the term of service; but by the amendment to the complaint the action was changed from a cause of action on contract to a cause of action on *quantum meruit* or for the value of the plaintiff's services. Upon the evidence the referee was justified in finding that the value of the services rendered was not in excess of the amount actually paid to him in the absence of a contract fixing the amount to be paid. If the amendment, itself, would not be sufficient to justify this conclusion, the express stipulation of the plaintiff's counsel when the amendment was allowed that the action was thereupon based, not upon an express contract, but upon *quantum meruit*, would prevent the plaintiff from recovering upon an express or implied contract fixing the value of the services. The plaintiff thus having elected to stand upon proof of the value of the services rendered, and the referee having found that the value of the services did not exceed the amount actually paid to him, and that finding being sustained by the evidence, I do not see how we can reverse the judgment. Assuming, however, that the plaintiff is entitled to recover under the contract as found by the referee, I do not think that he has established that he is entitled to a judgment in his favor.

We will consider the three items to which attention has been called. *First*, as to the charge for interest upon the capital invested in the business in determining the net profits. The plaintiff expressly swore that it was part of the agreement that the net profits should be ascertained by the same method that he had been in the habit of ascertaining his net profits. When this contract was made the plaintiff was actually in the defendant's employ. I think it can be fairly inferred that under such circumstances, considering the nature of the employment, the plaintiff was familiar with the methods that the defendant had adopted in ascertaining the net profits of the business from year to year, but whether he was or not, the contract was to pay the net profits ascertained by the method that had been agreed on. It appeared from the evidence, and the

referee found, that these charges of interest upon the amount of capital invested in the business was the customary method by which the defendant had estimated the profits of the business from year to year. So that plaintiff continued in the employment under an agreement by which he was to have an interest in the net profits, made up as the defendant had been in the habit of making up his accounts from year to year in ascertaining the net profits of the business; and thus, at the end of the first year, when the accounts were made up, it appeared that the net profits of the business had been ascertained upon this method adopted by the defendant, of which the plaintiff had knowledge. The account showing the net profits of the business was furnished to the defendant, and he received his compensation based upon such computation. He then continued in the business upon an implied agreement that he was to receive the same compensation that he had received under the contract for the year that had been completed; but the agreement necessarily involved the method by which the net profits were to be ascertained. At the end of the second year, when it appeared from the statement of the defendant's business that the plaintiff would be entitled to a small sum of money, over and above the amount that he had withdrawn, not amounting to \$500, and that the defendant had stated that he would allow him \$500, although the amount he was entitled to receive was not as much, he acquiesced in that statement and accepted the \$500, and this was repeated at the end of each of the following years that the plaintiff remained in the defendant's employ.

It seems to me quite clear that under these circumstances the contract that was to control for the succeeding years was based upon the contract as to the method by which the net profits were to be ascertained and which had been confirmed by the actual construction of the parties under it, and by this contract both parties were bound.

In relation to the second claim of the plaintiff, that it was improper to charge the amount actually paid to him as an expense to the business before ascertaining the amount of the net profits by the contract as sworn to by the defendant, when the parties were determining whether or not plaintiff should draw \$3,000 or \$4,000 a year, defendant stated that "whatever amount we fix upon will be

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charged to expense account," and that in reply to that the plaintiff said, "I don't care, I would rather have \$4,000 sure," to which the defendant assented, and the referee has found that the contract was according to the defendant's testimony. Here was an express agreement by which the defendant's salary was to be charged as an expense of the business, and that what he would be entitled to be paid would be estimated upon the net profits after treating the amount actually paid him as a disbursement, and this charge was also assented to by both parties. In relation to the stock of the S. S. Fritz Company, which the defendant charged off as a total loss in 1903, the utmost that the plaintiff could claim was that it should not be considered a total loss, but should be treated as an asset of the firm at its actual value. The testimony is undisputed that the defendant had tried to sell it at twenty-five cents on the dollar and had been unable to get a bid for that amount. It, therefore, could only be treated as an asset and the defendant required to account for it as worth twenty-five cents on the dollar. Assuming that it should be treated as an asset to that extent, the plaintiff would be entitled to be credited with the sum of \$337.50; but as he was paid a sum largely in excess of that amount, over and above the net profits to which he was entitled under the contract, it did not appear that the plaintiff was entitled to recover. Although it would appear from his opinion that the referee had an erroneous view of the law to be applied in ascertaining the right of the plaintiff upon the facts as found by the referee, I do not see that the referee could come to any conclusion considering the form of the action which resulted from the amendment of the complaint other than that reached by him; and as there appears to be no error in any ruling of the referee upon the trial which would justify a reversal of the judgment, the judgment should be affirmed, with costs.

PATTERSON, P. J., McLAUGHLIN and CLARKE, JJ., concurred;
HOUGHTON, J., dissented.

HOUGHTON, J. (dissenting):

I think there should be a new trial granted in this case on the ground that the trial had before the referee was upon a wrong theory.

The referee states by his opinion that he did not consider in any

manner the agreed compensation provided by the verbal contract. Even if the contract was void by the Statute of Frauds and could not have been enforced as an executory contract, it having been executed by the parties the agreed compensation provided thereby was the measure of the services theretofore performed, or, at least, evidence of the price which the parties had agreed upon and should have been taken into consideration by the referee in rendering his judgment. (*Adams v. Fitzpatrick*, 125 N. Y. 127.)

The refusal of the referee to find the third request of the plaintiff that such a contract was entered into is sufficient indication that he tried the case upon a wrong theory, even if his opinion cannot be used for the purpose of ascertaining that fact.

The theory of the trial having been wrong, I do not think this court can say that, upon the evidence, if it had been properly tried the plaintiff established no cause of action. Manifestly the defendant would not have been entitled to charge interest on the capital as an expense of his business unless the plaintiff had agreed to it. The referee repudiated the agreement and allowed the defendant to charge up interest as a part of the expense of his business.

I think, too, that with respect to the \$9,000 of stock, that the defendant did not have the right to charge that up as a total loss, inasmuch as he had taken it upon his debt and it had paid one dividend and was of some value. The fact that defendant had voluntarily paid plaintiff in excess of the \$4,000 did not extinguish plaintiff's claim to this asset.

I have grave doubt, too, whether, under the contract as claimed by plaintiff, the \$4,000 of guaranteed profits paid to the plaintiff was fairly proven to be chargeable as an expense of the business. The agreement as claimed was not for a salary of \$4,000, but was for fifteen per cent of the profits, which were guaranteed by the defendant to be at least \$4,000. If fifteen per cent of the profits were less than \$4,000, then, of course, the plaintiff would have no claim for further compensation. I think the total profits should have been ascertained without first deducting the \$4,000.

I, therefore, dissent from an affirmance of the judgment.

Judgment affirmed, with costs. Order filed.

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First Department, January, 1907.

JOHANNES E. SCHROEDER and HERMANN R. BRAUSS, as Ancillary Administrators, etc., of JOHANNES SCHROEDER, Deceased, Respondents, v. ALBION L. PAGE, as Ancillary Executor, etc., of JOHN M. YOUNG, Deceased, Appellant.

First Department, January 25, 1907.

Fraud — transfer of property by insolvent corporation to pay notes on which the transferee was liable — sufficient consideration — statute against preference.

The defendant's testator was liable on notes issued without his consent, of the proceeds of which a corporation of West Virginia had received the benefit. The testator was not an officer of the corporation, and brought action against it to compel it to meet the notes on which he was liable. The corporation, having no defense, transferred sufficient of its property to satisfy the notes. In an action against the testator's representatives based on fraud,

Held, that the transaction by the testator was not fraudulent;

That the act of the corporation was not in violation of the statute of West Virginia against preferences by insolvents.

APPEAL by the defendant, Albion L. Page, as ancillary executor, etc., from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 7th day of December, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the 24th day of November, 1905, denying the defendant's motion for a new trial made upon the minutes.

Alfred B. Cruikshank, for the appellant.

Edward A. Alexander, for the respondents.

INGRAHAM, J. :

The facts upon which this motion was brought are stated in the case of *Meyer v. Page* (112 App. Div. 625). We there held that that action being based upon charges of fraud against the defendant's testator could not be sustained as the evidence did not warrant the finding that the defendant's testator was guilty of fraud. There is no substantial difference in the facts proved in this case except that

in this case the plaintiffs read the testimony of the defendant's testator as part of their case and thus established the facts which we held in the case last cited were inconsistent with the charge of fraud against the defendant's testator.

The relation between the plaintiffs' testator and the defendant's testator, upon which the charge was based, existed by virtue of the power of attorney to act for plaintiffs' testator in the reorganization of the Young Importing Company. It is not disputed but that the defendant's testator was a creditor of that corporation when this power of attorney was received by defendant's testator, and that the plaintiffs' testator was treated in relation to the reorganization corporation as the defendant's testator was treated, and the only act complained of is that prior to the time that this power of attorney was executed or received by the defendant's testator he collected from the Young Importing Company a sum of money which was less than the amount of certain notes upon which he was liable which had been issued by the president of the importing company without his knowledge and during his absence. The proceeds of these notes had been actually received by the importing company and used to pay debts of that company to the plaintiffs' testator and others. It seems to be claimed by the plaintiffs that the defendant's testator was bound to disclose the fact that he had obtained money to pay these obligations before acting under the power of attorney in relation to the reorganization of the Young Importing Company. The defendant's testator, however, was not an officer or director of that company, and owed no duty to it or its creditors. He was a large creditor of the company before these notes were issued, but was under no legal duty to that company which prevented him from insisting that the company should provide for the payment of these notes upon which he was responsible, but which had been made and discounted without his knowledge and without his express or implied authority and which had been used for the benefit of the company. These facts all appear from the evidence now introduced by the plaintiffs. It also appeared from such evidence that the defendant's testator paid these notes which had been issued and used for the benefit of the Young Importing Company after he had obtained either the payment of or security for the amount that had been realized by the importing company from them. It also

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appears by the evidence introduced by the plaintiffs that the defendant's testator did not send Thomas Young, the president of the Young Importing Company, to Europe to interview the plaintiffs' testator and other European creditors; that Thomas Young did not represent him on that trip, that the defendant's testator was not bound by any representations made by Thomas Young to such European creditors, nor was he acquainted with such representations until after these actions against him had been commenced. Under these circumstances the charges of the complaint that the defendant's testator was guilty of any fraud or deceit in his relations with the plaintiffs' testator is without evidence to support it.

Stress is also laid by the plaintiffs upon the statute of West Virginia, under the laws of which State the Young Importing Company was incorporated, making preferences of insolvent incorporations illegal. But the evidence does not bring this case within that statute, as the enforcement of the claims by the defendant's testator against the Young Importing Company was not a preference within its provisions. The defendant's testator brought the action against the company to compel it to provide money to meet the notes which were issued without his consent or knowledge and upon which he was liable. He had a perfect right to commence the action and enforce that claim. It is not pretended that the Young Importing Company had any defense to that action, and it is perfectly apparent that if he had entered judgment and issued execution there was property of that company which would have been sufficient to satisfy that judgment. The fact that the company conceded its liability and satisfied the judgment out of its property created no liability against defendant's testator. There was certainly nothing in the relations between the plaintiffs' testator and the defendant's testator which prevented the defendant's testator from prosecuting that action and collecting the judgment due him, and nothing that required him to inform the plaintiffs' testator of the fact of his collecting this demand before acting on the power of attorney sent by plaintiffs' testator to reorganize the Young Importing Company.

The discussion of the questions involved in this case in deciding the former appeal (*Meyer v. Page*, 112 App. Div. 625) renders any

further discussion in this case unnecessary, and upon that opinion the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment and order reversed and new trial ordered, costs to appellant to abide event.

ACHILLE J. OISHEI, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant, Impleaded with GIOVANNI BONADDIO, Defendant.

First Department, January 25, 1907.

Attorney and client — action to enforce attorney's lien — when defendant settling action bound by lien of plaintiff's attorney — jurisdiction — when court may determine lien as against foreign defendant — process — when plaintiff's client may be served by substituted service.

A plaintiff's attorney upon bringing action has a lien by virtue of section 66 of the Code of Civil Procedure, which cannot be affected by any settlement

between the parties before or after judgment. Hence, when before judgment the defendant settles the action with the plaintiff without knowledge of his attorney, the lien attaches to the fund and the defendant makes payment to the plaintiff at its peril.

The defendant is charged with constructive notice of the lien, and it is its duty to ascertain the amount of the lien and retain such sum for the benefit of the attorney.

When a foreign defendant appears in an action brought in this State by a plaintiff who does not appear to be a non-resident, our courts may enforce the lien of the plaintiff's attorney.

When a foreign defendant served in this State has appeared in a suit in the courts of this State, and it is thereafter sought to enforce an attorney's lien against it, it cannot maintain that, being a foreign corporation, the money upon which the lien attaches is not within this State.

In such action to enforce the lien the client himself is a necessary party, being entitled to be heard as to the existence of the lien and the attorney's right to enforce it, but when the client has departed from the State, he may be served by substituted process, for the action is *in rem*.

When our courts have obtained jurisdiction of a foreign defendant by its appearance in an action, the decisions relating to the jurisdiction obtained over property in the hands of a foreign corporation by service of attachment upon its agent have no application.

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When in such action to enforce an attorney's lien it appears that the client has departed from the State and is financially irresponsible, it is not error for the judgment to provide that an execution be issued against the client and returned unsatisfied before the defendant is bound to pay.

The removal of an action to the United States Circuit Court before settlement does not prevent the Supreme Court from enforcing an attorney's lien which attached upon the commencement of the action in that court, if the court has obtained jurisdiction of the defendant.

APPEAL by the defendant, the Pennsylvania Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of April, 1906, upon the decision of the court rendered after a trial at the New York Special Term adjudging the plaintiff to have an attorney's lien upon a cause of action brought by Giovanni Bonaddio against the Pennsylvania Railroad Company.

Norman B. Beecher, for the appellant.

Nelson L. Keach, for the respondent.

INGRAHAM, J.:

This action was brought to enforce an attorney's lien. It appears that on or about the 21st of February, 1901, the defendant Bonaddio was a passenger upon one of the trains of the defendant railroad company, and received injuries thereon in the State of New Jersey; that on or about the 26th of February, 1901, the plaintiff, an attorney and counselor at law duly admitted to practice in the courts of this State, was employed and retained by Bonaddio to bring suit against the defendant railroad company to recover for the injuries sustained by him, and at that time made an agreement by which he was to pay the plaintiff one-third of any recovery had or settlement made with the said Pennsylvania Railroad Company by reason of the injuries so received, and the plaintiff was also to be entitled to any costs awarded in any proceeding brought to enforce such cause of action. Pursuant to this retainer and on or about the 28th of February, 1901, an action was brought in the Supreme Court of this State by the defendant Bonaddio against the Pennsylvania Railroad Company, the plaintiff appearing as his attorney. On the 17th of June, 1901, the said railroad company settled the cause of action to enforce which the action in the Supreme Court of this State was brought for \$1,500, which was

paid to the defendant Bonaddio, from whom the company received a general release. Such settlement was effected and release delivered without the knowledge or consent of the plaintiff. The said Bonaddio has not paid the plaintiff any part of the amount for which the said cause of action was settled and adjusted, and is at present without the jurisdiction of the State and financially irresponsible.

Upon the plaintiff commencing the action against the Pennsylvania Railroad Company for the injuries which Bonaddio sustained while a passenger upon one of its trains, there accrued to the plaintiff a lien upon the cause of action sought to be enforced. Under section 66 of the Code of Civil Procedure this lien attached upon the commencement of the action to any "verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever* hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order." A lien of this character was before the Court of Appeals in *Fischer-Hansen v. B. II. R. R. Co.* (173 N. Y. 492), and while it was there held that the existence of this lien did not interfere with the client's right to settle the controversy, it was also held that upon such a settlement the claim or cause of action is extinguished and the lien follows and attaches to the fund which represents the cause of action extinguished by the settlement, and the claim of the attorney for compensation for his services becomes a lien upon the fund in the hands of the railroad company which belongs to the client and it stands in place of the cause of action which, prior to the settlement, was subject to the lien; that "the right of the parties to thus settle is absolute and the settlement determines the cause of action and liquidates the claim. This necessarily involves the reciprocal right of the attorney to follow the proceeds of the settlement, and if they have been paid over to the client, to insist that his share be ascertained and paid to him, for the defendant is estopped from saying that with notice of the lien he parted with the entire fund." The lien thus having been attached to the fund in the hands of the railroad company which stood in place of the cause of action upon which plaintiff had a lien, that lien could not be defeated by payment to the client, for defendant made such payment at its peril. It had at least construc-

* *Sic.*

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tive notice of the lien and its duty was to ascertain the amount of the lien and retain it for the benefit of the attorney. The court said, "a lien upon a claim or a cause of action follows the fund created by a settlement of the claim, which thereupon ceases to exist. It attaches to the amount agreed upon in settlement the instant that the agreement is made, and if the defendant pays over to the client without providing for the lien of the attorney, he violates the rights of the latter and must stand the consequences. We think that the plaintiff had a lien upon the sum which the defendant agreed to pay to extinguish the cause of action, and that the law will not permit it to say that it has nothing in its hands to satisfy it. The lien was not affected by the judgment, but leaped from the extinguished cause of action to the amount agreed upon in settlement." Applying this rule, it follows that, when the terms of the settlement were actually agreed upon and the defendant had in its hands the sum of \$1,500, such amount was subject to a lien in favor of this plaintiff for one-third of that sum, or \$500. The defendant having appeared in the action commenced in the Supreme Court of the State of New York, the courts of this State had jurisdiction as it did not appear that plaintiff was a non-resident, and the defendant holding in its hands the sum of \$1,500 subject to a lien in favor of the plaintiff, it could not impair this lien or take from the plaintiff the right to enforce such lien by paying the money to the plaintiff in that action. (See, also, *Oishei v. Pennsylvania R. R. Co.*, 101 App. Div. 473; and *Oishei v. Metropolitan St. R. Co.*, No. 1, 110 id. 709.)

As the plaintiff had a lien upon the fund in the hands of the defendant, in an action or proceeding to enforce such lien the client was a necessary party, as such client was entitled to the fund subject to the lien and had a right to be heard as to the existence of the lien and the attorney's right to enforce it. (*Oishei v. Pennsylvania R. R. Co.*, *supra*; *Oishei v. Metropolitan St. R. Co.*, No. 1, *supra*.) This action was, therefore, properly brought against the railroad company, in whose hands the fund was at the time the lien attached, and against the client, who had a right to be heard before a part of his money in the possession of the railroad company could be appropriated to the payment of the plaintiff's lien. Since the settlement, however, the client has departed from this State and service of proc-

ess upon him personally could not be had, and the defendant claims that the court, therefore, lost all jurisdiction to determine the amount of the lien. It bases this claim upon the allegation that as it was a foreign corporation and the money upon which the lien attached was in its hands as such foreign corporation, the fund was, therefore, not within this State, so that the rights of the several parties to the action to it could be adjudicated. The defendant, although a foreign corporation, was served in this State and appeared in this action. The court thus obtained jurisdiction over the person of the defendant and had jurisdiction over the subject-matter of the action to enforce a lien on a cause of action, an action to enforce which was pending in this State. By the service upon the defendant and its appearance in this action the court obtained jurisdiction over the defendant and could enforce on behalf of the plaintiff — a resident and citizen of this State — his right to the possession of the fund in its hands. The right to attach this fund and adjudicate as to whom it belonged attached when the court obtained jurisdiction of the person of the defendant, and the courts of this State, therefore, had the right to bring in by substituted service all those who had any interest in the fund, the ownership of which was in dispute. Here a defendant over whom the court had jurisdiction concededly had in its hands a fund, the ownership of which was in dispute between a citizen of this State and others who were without its jurisdiction. The defendant who had possession of the fund was before the court and the court had jurisdiction over him and could enforce a judgment determining the ownership of the fund; and by virtue of the jurisdiction thus acquired over the corporation in whose possession the fund was, the fund itself was within the jurisdiction of the court. The court, therefore, had power to call in all others interested in the fund by substituted service of process. As the question to be determined was the ownership of a fund subject to the jurisdiction of the court the proceeding was in rem, the judgment determining the ownership of the fund was binding upon all the parties to the action properly served by process, either personally or by substituted service as authorized by law.

The decisions relating to the jurisdiction obtained over property in the hands of a foreign corporation by a service of attachment upon an agent of the corporation situated within the jurisdiction in

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which the attachment proceeding was issued have no application to a case where the court has acquired jurisdiction over such foreign corporation by personal service of process within the jurisdiction or the voluntary appearance of such foreign corporation. If the plaintiff was the owner of a promissory note or bond of the Pennsylvania Railroad Company and commenced an action to recover the amount of such note or bond and obtained jurisdiction over the person of defendant, I apprehend that there could be no defense to such an action on the ground that the defendant was a foreign corporation; and if a non-resident of the State make a claim to such obligation and as such was made a defendant and was brought in by service of process by publication, the jurisdiction of the court to determine the question as to who was entitled to recover upon such an obligation could not be questioned. The ownership of the obligation being the question in controversy, the court having obtained jurisdiction over the person of the defendant in the action to enforce that obligation would have a right to make any one whose presence was necessary a party to that action for the purpose of a complete determination of the question, and make service of process upon him by publication or otherwise as the Code of Civil Procedure (§ 438 *et seq.*) required. An entirely different question is presented where a debt or demand in favor of a non-resident against a foreign corporation is sought to be attached in an action in which the court has no jurisdiction over either the person of the defendant or the cause of action or demand sought to be attached.

There is nothing in the case of *Morehouse v. Brooklyn Heights R. R. Co.* (185 N. Y. 520) which is at all inconsistent with this view. It is true the court approved in that case of a judgment which required the plaintiff to issue execution against the property of the client, as the defendant company only became liable to pay in case such execution issued against Nathan was returned unsatisfied. But in this case it was expressly found that the client, although served with process, did not appear; that he was without the jurisdiction of the court, and was a day laborer, financially irresponsible. The law never requires an unmeaning ceremony to be performed before a substantial right is enforced, and although a joint judgment is awarded against both defendants, the provision that an execution should be issued and returned unsatisfied against the client before

the railroad company is bound to pay, where the issuance of such an execution would, upon the facts found, be entirely ineffectual, is not error. By payment of this claim the railroad company would have a right to enforce the claim against the client, or, by way of subrogation, the right to enforce the judgment awarded against him. I think, therefore, the court had jurisdiction.

These questions were discussed in *Oishei v. Pennsylvania R. R. Co.* (*supra*) and *Oishei v. Met. St. R. Co. No. 1* (*supra*), and although it is claimed by counsel for the defendant that such discussions in those cases were obiter, the rule there announced received the approval of the court, and we are satisfied that what was said is correct.

The other question presented upon this appeal is whether the court lost jurisdiction to determine this question in consequence of the removal of the action brought to enforce the cause of action upon which the plaintiff had a lien to the United States Circuit Court before the settlement. It is quite clear, however, that such removal did not affect the plaintiff's lien upon the cause of action sought to be enforced as the lien existed by operation of law. The right to the lien did not depend in any way upon the decision or judgment of the United States Circuit Court; the lien attached upon the commencement of the action in the Supreme Court of the State of New York and upon the settlement attached to the fund in the hands of the defendant, which determined the cause of action, and the relation between the plaintiff and defendant was not different from that in any case in which the defendant had in its hands a fund to which a lien had attached. The plaintiff, therefore, had the right to apply to the Supreme Court of the State of New York, a court of competent jurisdiction, to enforce that lien if it could get jurisdiction over the defendant railroad company, who had in its hands the fund to which the lien attached.

It follows, therefore, that upon the facts found, which are supported by the evidence, the judgment in favor of the plaintiff was right, and should be affirmed, with costs.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

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ACHILLE J. OISHEI, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant, Impleaded with VINCENZO SPINA, Defendant.*

First Department, January 25, 1907.

APPEAL by the defendant, the Pennsylvania Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of April, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, adjudging the plaintiff to have an attorney's lien upon a cause of action brought by Vincenzo Spina against the said Pennsylvania Railroad Company.

Norman B. Beecher, for the appellant.

Nelson L. Keach, for the respondent.

PER CURIAM:

For the reasons stated in the case of *Oishei v. Pennsylvania Railroad Co.* (117 App. Div. 110) decided herewith, this judgment was right, and should be affirmed, with costs.

Present—PATTERSON, P. J., INGRAHAM, McLAUGHLIN, HOUGHTON and LAMBERT, JJ.

Judgment affirmed, with costs. Order filed.

ACHILLE J. OISHEI, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant, Impleaded with DOMENICO FARRARELLI, Defendant.*

First Department, January 25, 1907.

APPEAL by the defendant, the Pennsylvania Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the

* See *Oishei v. Pennsylvania Railroad Co.* (ante, p. 110).—[REP.]

2d day of April, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, adjudging the plaintiff to have an attorney's lien upon a cause of action brought by Domenico Farrarelli against the said Pennsylvania Railroad Company.

Norman B. Beecher, for the appellant.

Nelson L. Keach, for the respondent.

PER CURIAM:

For the reasons stated in the case of *Oishei v. Pennsylvania Railroad Co.* (117 App. Div. 110) decided herewith, this judgment was right and should be affirmed, with costs.

Present — PATTERSON, P. J., INGRAHAM, McLAUGHLIN, HOUGHTON and LAMBERT, JJ.

Judgment affirmed, with costs. Order filed.

ACHILLE J. OISHEI, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant, Impleaded with FRANCESCO GRASTELLO Defendant.*

First Department, January 25, 1907.

APPEAL by the defendant, the Pennsylvania Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of April, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, adjudging the plaintiff to have an attorney's lien upon a cause of action brought by Francesco Grastello against the said Pennsylvania Railroad Company.

Norman B. Beecher, for the appellant.

Nelson L. Keach, for the respondent.

* See *Oishei v. Pennsylvania Railroad Co.* (ante, p. 110).—[REP.]

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PER CURIAM:

For the reasons stated in the case of *Oishei v. Pennsylvania Railroad Co.* (117 App. Div. 110) decided herewith, this judgment was right, and should be affirmed, with costs.

Present — PATTERSON, P. J., INGRAHAM, McLAUGHLIN, HOUGHTON and LAMBERT, JJ.

Judgment affirmed, with costs. Order filed.

ACHILLE J. OISHEI, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant, Impleaded with VINCENZO MORENNA, Defendant.*

First Department, January 25, 1907.

APPEAL by the defendant, the Pennsylvania Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 2d day of April, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, adjudging the plaintiff to have an attorney's lien upon a cause of action brought by Vincenzo Morenna against the said Pennsylvania Railroad Company.

Norman B. Beecher, for the appellant.

Nelson L. Keach, for the respondent.

PER CURIAM:

For the reasons stated in the case of *Oishei v. Pennsylvania Railroad Co.* (117 App. Div. 110) decided herewith, this judgment was right and should be affirmed, with costs.

Present — PATTERSON, P. J., INGRAHAM, McLAUGHLIN, HOUGHTON and LAMBERT, JJ.

Judgment affirmed, with costs. Order filed.

*See *Oishei v. Pennsylvania Railroad Co.* (ante, p. 110). — [REP.]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. VINCENT
TRISCOLI, Appellant.

First Department, January 25, 1907.

Crime — blackmail — judgment of conviction affirmed.

In a prosecution for sending threatening letters in violation of section 558 of the Penal Code, it appeared that the complaining witness had received two letters from a society called the "Black Hand," demanding payment of \$500, in default of which he and his family would be destroyed. The complaining witness testified that the defendant had called on him and demanded the payment of the money in compliance with the letters. On the whole evidence *Held*, that a judgment of conviction should be affirmed.

APPEAL by the defendant, Vincent Triscoli, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 29th day of August, 1906, convicting him of the crime of blackmail, and also from an order entered in the office of the clerk of said court on the 7th day of September, 1906, denying the defendant's motion for a new trial.

Edward McKinley, for the appellant.

E. Crosby Kindleberger, for the respondent.

INGRAHAM, J.:

The defendant was convicted of a violation of section 558 of the Penal Code. That section provides that "a person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received * * * any letter or writing, threatening * * * to do any injury to any person or to any property, * * * is punishable by imprisonment for not more than five years." It appeared from the evidence that one Salvatore Grasso received on May 29, 1906, a communication addressed to him, dated May 28, 1906, purporting to come from the Society of the Black Hand which stated that the society had decided his case, and that it demanded from Grasso the sum of \$500; otherwise "death will be the reward, and your family will be destroyed. Consider that well, and consider our demand; otherwise you are lost, and no one

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could save you. Our vengeance will reach you wherever you will be, and you will all be destroyed, in the time of half an hour." This letter was signed, "We are your friends, THE BLACK HAND." Grasso not having complied with this demand, he received on the thirty-first day of May another letter; dated on that day, which referred to the former letter of the society and threatened that unless he complied with the second and last warning, his family would be destroyed. This demand not being complied with, the defendant called at Grasso's place of business and said that he wanted to speak to Grasso in secret, Grasso saying that he was in the presence of his family, and if the defendant wanted to have a confidential talk with him, he could have it right there. Whereupon the defendant said, "Have you received my letters?" Grasso said, "What letters?" to which the defendant replied, "These letters in which you were asked to pay \$500." In answer, Grasso said, "I can't give you the \$500 this evening; call in to-morrow and I'll give it to you," to which the defendant said, "You will have to put down the money to-night, this evening," to which Grasso replied, "I can't do that; I can't give you the money this evening." After that the defendant stepped outside of the store, making a sign to Grasso to follow him. When Grasso went outside he called to a police officer, and the defendant ran away, but was arrested about a block away. Grasso testified as to the receipt of these letters and that these were the only letters of the kind that he had received.

The defendant was called as a witness and testified that he knew nothing about the letters; that he went to the complainant's place of business to buy a pair of shoes; that he did not send the letters or cause them to be sent, and did not ask anybody to send them; that he made no statement to the complainant about the letters and made no demand upon him; that he had money in his pocket to buy the shoes. The police officer who caused the arrest stated that he was in Second avenue; that he ran down the avenue and spoke to the complaining witness and chased the defendant about a block and a half and caught him on Fifty-first street and First avenue; that when he first saw the defendant he was about twenty-five feet from the complainant's store, running.

The question was submitted to the jury by a charge which seems to be entirely fair and to which no exception was taken; and the

only exception relied on is a denial of the motion to advise the jury to acquit. I think there was evidence that justified the submission of this case to the jury. The defendant, at his interview with the complainant, asked him if he had received his letters in which \$500 was demanded. The complainant had received two letters demanding \$500, and no other letters of the kind were received by him. The letters being clearly within the statute, if the defendant sent them, "knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet or procure any illegal or wrongful act," he is guilty of blackmail. The defendant's statement to Grasso admitted that he sent the letters received by the complainant and stated that they were his letters; and the jury was, therefore, justified in finding that he knew their contents, and that he either sent, delivered or caused them to be forwarded or received by the complainant.

I think the evidence justified the conviction and that the judgment should be affirmed.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed. Order filed.

WILLIAM WILLS and JAMES WILLS, Respondents, v. JAMES ROWLAND & COMPANY, Appellant.

First Department, January 25, 1907.

Practice — when judgment by default not opened — failure of proposed answer to allege defense — party — when liquidating committee of corporation may defend.

The liquidating committee of a corporation authorized to take all legal proceedings necessary to carry the liquidation into effect are officers of the corporation within the meaning of subdivision 1 of section 525 of the Code of Civil Procedure and may defend an action.

But when such committee seeks to open a judgment taken by default, its answer must state a defense. When the action was brought upon a promissory note secured by collateral, it is no defense to allege that the holder of the note converted the collateral, if it be not set out as a set-off or counterclaim that the collateral was of value or that the defendants have sustained damage.

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APPEAL by the defendant, James Rowland & Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of December, 1906, denying the defendant's motion to open a default and vacate a judgment in favor of the plaintiffs entered in said clerk's office on the 17th day of November, 1906.

Hector M. Hitchings, for the appellant.

Delos McCurdy, for the respondents.

INGRAHAM, J.:

The action was to recover upon a certain promissory note made by the defendant to the Trust Company of America upon which there was due \$140,000, for which certain stock was deposited as collateral security, a portion of which was owned and deposited by the plaintiffs. Subsequently the plaintiffs paid the trust company the amount due them and became the owners of the note. This summons and complaint was served upon the secretary of the defendant corporation on the 25th day of October, 1906. The corporation having failed to appear or answer, judgment was entered on the default on November 17, 1906. Subsequently, and on the 27th day of November, 1906, a motion was made by counsel who appeared in the action for the defendant for leave to serve an answer on behalf of the defendant, a copy of which was annexed to the moving papers. This answer was verified by George C. De Lacy and Edward L. Lewis, who state that they are a liquidating committee appointed by the creditors and directors of the defendant. It appears that after the giving of the note to the trust company the creditors and stockholders of the defendant corporation, including the plaintiffs, signed an agreement by which the corporation was to be liquidated, and the board of directors were empowered to appoint a committee who should have full power and authority to carry into effect, manage and conduct such liquidation, and that the committee was to have authority to "take any and all legal proceedings to carry such liquidation into full force and effect." In pursuance of this agreement De Lacy and Lewis were appointed as a liquidating committee by the directors of the company, and after their

appointment and the commencement by them of the discharge of their duties, but before the note became due, the trust company demanded additional security on the note. The defendant not complying with that demand, the plaintiffs paid to the trust company the amount due on the note, and received the note and the stock deposited as security. I am inclined to think that under this agreement this committee was authorized to defend actions against the company when necessary to properly carry out its duties as liquidating committee. The company had the right to defend the action if it had a defense. The complaint was verified and an answer must be also. Subdivision 1 of section 525 of the Code provides that where a party is a domestic corporation the verification must be made by an officer thereof. The question is presented whether the members of the liquidating committee were officers of the corporation within the meaning of this section of the Code. They were authorized by the agreement under which they were appointed to take any and all legal proceedings necessary to carry the liquidation into full force and effect, and I think they were, if necessary for the proper performance of their duties, authorized to defend the action against the corporation, and were, therefore, "officers of the corporation" within that section. (See *Matter of St. Lawrence & A. R. R. Co.*, 133 N. Y. 270.) It is, however, clear that the answer sets up no defense.

Assuming that the trust company did not have the right to demand additional security, if the plaintiffs paid the note and received it with the collateral securities they became the owners of the note and entitled to enforce it when it became due. The note was dated January 9, 1906, and was payable six months after date. It became due July 9, 1906. The action was commenced in October, 1906. The note was, therefore, due when the action was commenced. The plaintiffs were the owners of the note, and there does not seem any way that the defendant can avoid paying it.

The allegation that the plaintiffs had converted the stock deposited as collateral security for the note is not a defense to plaintiffs' cause of action. It is not alleged as a set-off or counterclaim, nor that it is of any value, or that plaintiffs have sustained any damages. When a defendant asks to be allowed to defend an action in which the judgment has been entered by default, the proposed answer

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must set up a defense, and as no defense appears in the proposed answer, I think the order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., and LAUGHLIN, J., concurred; McLAUGHLIN and HOUGHTON, JJ., concurred in result.

Order affirmed, with ten dollars costs and disbursements. Order filed.

DIERCK SCHOMACKER, Respondent, v. SOPHIA MICHAELS, Appellant.

First Department, January 25, 1907.

Real property — *lis pendens* — action for specific performance of personal covenant of grantee.

When a grantee covenants to pay to the grantor any amount recovered in consequence of the destruction of easements by a railroad company, it is a personal covenant, does not run with the land, and does not affect the easements appurtenant thereto. Hence, the grantor in an action for the specific performance of such covenant is not entitled to file a *lis pendens*.

APPEAL by the defendant, Sophia Michaels, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of December, 1906, denying the defendant's motion to cancel and discharge of record a *lis pendens* theretofore filed in said clerk's office.

Abraham A. Silberberg, for the appellant.

L. M. Berkeley, for the respondent.

INGRAHAM, J.:

The action was brought for the specific performance of an agreement contained in a conveyance by the plaintiff to one Quay for the release of certain easements in the premises conveyed by the plaintiff to Quay; and a notice of the pendency of this action was filed when the action was brought. The defendant interposed an answer, and moved to cancel the notice of pendency of action upon the ground that this action was not one in which the plaintiff

could file such a notice. This motion was denied and the defendant appeals.

It would seem by the decision of the Court of Appeals in *McKenna v. Brooklyn Union Elevated R. R. Co.* (184 N. Y. 391) that this reservation in the deed was a personal covenant and did not affect the easement appurtenant to the property. Quay became the absolute owner of the easement, but undoubtedly any sum of money that she received from the railroad company for a destruction or appropriation thereof she would hold for the plaintiff's benefit; but I do not see how this affected in any way the real property, or authorized the defendant to file a notice of the pendency of action. The Court of Appeals in the *McKenna* case expressly held that there was no equitable lien upon the easement which was binding upon a grantee of the plaintiff's grantee, that such easements are inseparable from the estate to which they are appurtenant and the covenants in the deed in relation thereto were personal covenants of the grantee. They did not run with the land and could not affect either the property or the easement which was appurtenant to it. Section 1670 of the Code of Civil Procedure provides that, "in an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of real property," if the complaint is verified, the plaintiff may file a notice of the pendency of the action, but as this action could not affect either the title to or the possession, use or enjoyment of real property, the notice of the pendency of the action was improper. If the defendant is bound to execute any release releasing this easement to the railroad company it is because she has assumed a personal covenant of the original grantee by the conveyance of the property to her. The plaintiff claims that this covenant gives her a vendor's lien for the value of these easements, but I do not see how that can follow. The consideration for the conveyance was the amount paid, and the agreement of the grantee in substance was to pay to the plaintiff any amount that should be recovered in consequence of the destruction of these easements by the railroad company. It is true, in an action of this character, the court will not determine whether or not the cause of action can be sustained, but where there is no allegation in the complaint upon which a judgment could be recovered affecting the title to or the possession, use or enjoyment of real

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property the notice of pendency of the action was improperly filed, and it should be canceled.

The order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

PATTERSON, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

FREDERICK FOX, as Executor, etc., of HENRY VIZETHANN, Deceased,
Appellant, v. JOHN D. CHAPMAN, Respondent.

First Department, January 25, 1907.

**Practice — right to damage not determined on motion to strike out
allegations of complaint.**

When a question arises as to whether a pleading states a cause of action or defense, the issue must be presented by demurrer, or upon trial at the opening thereof, or when the evidence is offered, or at the close of the case by motion. Especially is this true as to the measure or items of damage.

Thus, when the complaint in an action to recover damages for death by wrongful act alleges that the widow of the deceased spent large sums of money for hospital room and board and for care and medical attendance, the right to recover such items cannot be decided upon a motion to strike the allegations from the complaint.

APPEAL by the plaintiff, Frederick Fox, as executor, etc., from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of November, 1906, as strikes out a certain allegation of the complaint.

Alison M. Lederer, for the appellant.

John E. Walker, for the respondent.

McLAUGHLIN, J. :

This is the ordinary negligence action to recover damages alleged to have been sustained by the widow and next of kin by reason of

the death of plaintiff's testator. The complaint alleges that the testator was injured on the 25th of October, 1903, and as a result of such injuries he died on the 13th of September, 1904. Then follows this allegation: "That during the interval between the said 25th day of October, 1903, and the 13th day of September, 1904, large sums of money were necessarily expended on behalf of the said Henry Vizethann by his widow for hospital room and board and for medical attendance and nursing and medicines and medical appliances, and after his decease as aforesaid for sepulture and funeral expenses."

Before an answer had been interposed the defendant moved to strike out the allegation quoted, on the ground that the same was "superfluous and unnecessary and that the expenses therein alleged to have been incurred are not properly recoverable as items of damage." The motion was granted except as to the "sepulture and funeral expenses," and plaintiff has appealed.

We are not called upon at this time to determine, nor was it proper for the court below to do so, whether the damages alleged in the allegation stricken out are recoverable. The plaintiff's right to judgment, however, upon this claim is barred and forever foreclosed by the order which has been made; in other words, the trial of that issue has been determined upon a motion. Such practice is improper. (*Durham v. Durham*, 99 App. Div. 450.) The proper practice, where a question arises as to whether a pleading states a cause of action or a defense, is to present the question by demurrer, or else upon the trial, either at the opening or when the evidence is offered, or at the close of the case, by motion. (*Hoffman v. Wight*, 137 N. Y. 621; *Walter v. Fowler*, 85 id. 621.) And especially is this true where the question arises as to the measure or items of damage. (*Pavenstedt v. New York Life Ins. Co.*, 103 App. Div. 36.)

It follows that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to strike out denied, with ten dollars costs.

PATTERSON, INGRAHAM, LAUGHLIN and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs. Order filed.

ALEXANDER McKEAGGAN, as Administrator, etc., of JOHN McKEAGGAN, Late of the Borough of Manhattan, City of New York, Deceased, Respondent, v. Post & McCord, Appellant.

First Department, January 25, 1907.

Costs — non-resident plaintiff — when right to security for costs absolute.

It seems, that when it is conceded that the plaintiff is a non-resident and has no property within the State, the defendant's right to security for costs is absolute under section 3268 of the Code of Civil Procedure.

In any event the court, in the exercise of its discretion under section 3271 of the Code of Civil Procedure, should order security for costs under such circumstances.

APPEAL by the defendant, Post & McCord, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of November, 1906, denying the defendant's motion for an order requiring the plaintiff to file security for costs.

Louis Cohn, for the appellant.

Talbert W. Sprague, for the respondent.

McLAUGHLIN, J.:

This action is brought to recover damages alleged to have been sustained by the widow and next of kin by reason of the death of plaintiff's intestate. Before answering the defendant made a motion to compel the plaintiff to file security for costs. The motion was denied and defendant has appealed.

The facts set out in the moving papers were uncontradicted and were to the effect that the plaintiff and all of the next of kin for some time prior to and at the time of the commencement of the action were residents of Chelsea, Mass., and there was no property within the State of New York. These facts being uncontradicted, the motion for security should have been granted (*Pursley v. Rodgers*, 44 App. Div. 139), even though it be conceded that whether or not security should be required rested in the discretion of the court under section 3271 of the Code of Civil Procedure. Where the

plaintiff and all of the parties whom the plaintiff represents are non-residents, and where there is apparently no property of any kind within this State from which costs, in case plaintiff should fail in the action, could be collected, then the defendant is entitled to the favorable exercise of the court's discretion in requiring security for costs.

Indeed, it is not at all clear that the plaintiff was not entitled, as a matter of right, under section 3268 of the Code to security for costs. This section is a general provision and seems to relate to all cases where the plaintiffs are non-residents. However, it is unnecessary at this time to determine this question, because even under section 3271, upon the facts here presented, the defendant was entitled to the favorable exercise of the court's discretion.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion to compel the plaintiff to give security for costs granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

CHARLES M. R. WARD, Appellant, v. CITY TRUST COMPANY OF
NEW YORK, Respondent, Impleaded with THE HARTMAN
MANUFACTURING COMPANY, Defendant.

First Department, January 11, 1907.

Debtor and creditor—judgment creditor's action to recover sums paid to president of corporation—bills and notes—payment of individual debt by draft of corporation—when transferee holder in good faith for value—when holder not put upon inquiry as to defects.

The defendant trust company loaned to the president of a foreign corporation and another a sum of money, taking their personal note for the amount. The borrowers were owners of the entire capital stock of the foreign corporation and pledged the same with the trust company as security for the loan. Thereafter the borrowers applied for another loan with the alleged object of increas-

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ing the capital stock of the company, which loan was refused. The president of the foreign corporation negotiated with other parties for a loan on the credit of the company, and being successful and obtaining a draft payable to the order of his own corporation, paid his indebtedness to the defendant therewith and reclaimed the pledged stock. The draft with which the debt was paid was indorsed by him as the president and general manager of the company. The defendant trust company was informed at the time of the original loan that it was made to enable the borrowers to pay a balance due on stock of the corporation held by them. It also appeared that the borrowers were the sole stockholders of the corporation and that the president was vested by the board of directors with the entire control and management.

In an action to charge the defendant trust company with the value of the draft received by it on the ground that the money was used by the president to pay a personal debt,

Held, that the draft being commercial paper, and being taken by the trust company in discharge of a debt, the defendant was a holder for value whether the paper was taken before or after the debt was due;

That the plaintiff in order to recover must show that the paper was not taken by the defendant in good faith;

That owing to the facts that the president had full control of the corporation and any inquiry on the part of the defendant would have revealed the fact that he was empowered to do any act on behalf of the corporation and that the transaction between the borrowers and the defendant might have been an act done on behalf of the corporation, the defendant was entitled to treat the acts of the borrowers as those of the corporation and thus took the paper in good faith and for value;

That the defendant was not bound to inquire further into the details of the arrangement between the president and his corporation other than that it had given its consent to the use of the money. Facts which put a holder or indorsee of commercial paper upon inquiry as to a possible defect put him upon inquiry in respect to that particular defect only, and the duty of inquiry extends no further;

That although the capital stock of a corporation is a trust fund for the benefit of its creditors, who have an equitable lien thereon, both as against the stockholders and all transferees, except purchasers in good faith for value, yet there is a difference between the vendee of the real or personal property of a corporation and one who takes its negotiable paper. In the latter case it is not a question as to the actual right of the transferor to convey, but as to his apparent right to make the transfer. When there is such apparent right of transfer a holder for value in good faith will be protected unless he has notice of an abuse of trust or intended fraud;

That the fact that the borrowers, when taking the original loan paid commissions and other expenses and directed the division of the money into several checks for this purpose, and subsequently to the knowledge of the defendant borrowed large sums from other banks, did not charge the lender with any knowledge of a fraudulent purpose;

That although the payment to the defendant by the president made his corporation insolvent, the defendant, being a transferee for value, was protected in the absence of knowledge or information leading it to believe or suspect that the corporation would be thereby made insolvent.

SCOTT and McLAUGHLIN, JJ., dissented.

APPEAL by the plaintiff, Charles M. R. Ward, from a judgment of the Supreme Court in favor of the defendant, the City Trust Company of New York, entered in the office of the clerk of the county of New York on the 29th day of August, 1905, upon the report of a referee dismissing the complaint upon the merits.

Thomas Thacher, for the appellant.

Morgan J. O'Brien, for the respondent.

Judgment affirmed, with costs, on opinion of referee.

Present — PATTERSON, P. J., McLAUGHLIN, LAUGHLIN, HOUGHTON and SCOTT, JJ.; McLAUGHLIN and SCOTT, JJ., dissented.

The following is the opinion of WILLIAM G. CHOATE, Esq., referee :

CHOATE, Referee :

This is an action brought by a judgment creditor of the Hartman Manufacturing Company, a corporation organized under the laws of Pennsylvania, against that company and the City Trust Company. The judgment creditor's execution having been returned unsatisfied, he seeks to recover from the City Trust Company \$125,000, with interest from August 2, 1901, on the ground that \$125,000 of the money of the Hartman Company was used by its president, Frank A. Umsted, on August 2, 1901, to pay a personal debt to the City Trust Company.

On March 27, 1901, the City Trust Company loaned to Umsted and one William L. Kiefer the sum of \$125,000, taking from Umsted and Kiefer their personal note for that amount, dated March 21, 1901, and maturing September 21, 1901. Umsted and Kiefer were the owners of all the capital stock of the Hartman Company, \$150,000 common stock and \$100,000 preferred stock, and the certificates for this stock were indorsed over to and deposited with the City Trust Company as security for the loan. For

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the further protection of the trust company the controlling interest in this stock was put in the name of one of the officers of the trust company, and one of its directors, Elverton R. Chapman, and John F. Plummer were made members of the board of directors of the Hartman Company to represent the interests of the trust company until the loan was paid. Chapman, who was a member of the executive committee as well as a director of the trust company, had investigated the proposed loan and recommended it. A premium or commission of \$5,000, in addition to interest, was offered by the borrowers, and Chapman offered to the trust company either to guarantee the loan and take the commission or to give the trust company the benefit of the commission. The trust company preferred the latter course and took the commission in addition to interest. The trust company was informed at the time of the transaction that this loan was to enable Umsted and Kiefer to pay a balance due on the stock, the whole price paid by them being as was stated, \$350,000. With a part of the money thus borrowed Umsted paid \$110,000, the amount which he had agreed to pay to the former owners of the stock for their interest, and on the twenty-eighth of March, the day after this loan, he took charge of the company's affairs and held a meeting of the board of directors. He was elected president and Kiefer was elected secretary and treasurer. Plummer, who at the same time became a member of the board, was elected vice-president.

Before the loan became due Umsted applied to the trust company for a further loan either for himself or for the Hartman Company, and stated that one of his objects was to increase the capital stock of the company.

The president of the trust company, who thought that a loan of this character was not one fairly within the proper business province of a trust company, but rather such a loan as should be obtained from a bank, was very willing that the loan should be paid off, and, knowing that Umsted could not increase the stock of the company without obtaining possession of the certificates of stock which were pledged with the trust company, refused to loan any more money, but consented that Umsted should pay off the loan before maturity. Accordingly, Umsted negotiated with the Hanover National Bank a loan on the credit of the Hartman Manufacturing Company for

\$200,000, and obtained from the Hanover National Bank a draft for \$125,000, payable to the order of the Hartman Company. He took this draft to the City Trust Company; indorsed it in the name of the Hartman Manufacturing Company by "F. A. Umsted, Pres't. & Gen'l Mgr." The trust company accepted this draft, thus indorsed, in payment of the debt of Umsted and Kiefer, and surrendered to Umsted their note and the certificates of the capital stock of the Hartman Company on the 2d day of August, 1901. And it is this sum of \$125,000 which the plaintiff claims the City Trust Company knew to be the money of the Hartman Company which the plaintiff seeks to recover in this action. A recovery is sought on three grounds.

1. That the use of the money of the corporation by Umsted, president and general manager, was without the consent of the corporation.

2. That by this transaction, diverting as it is claimed the funds of the company to the private use of Umsted and Kiefer, the assets of the company were reduced below the amount of its authorized capital stock and that the corporation itself had no authority or lawful right, being a going concern, thus to use its funds for the benefit of its stockholders or to divert them from corporate use.

3. That this payment or diversion of its funds from the use of the corporation or for other than corporation purposes made the corporation insolvent, and that the plaintiff could, therefore, recover the money so paid as a fraud upon the creditors.

I. As regards the first claim of the plaintiff, the trust company seems to have regarded Umsted and Kiefer as constituting in effect the corporation, they being, as the trust company was truly informed, the sole stockholders, and the president of the trust company seems to have acted upon the theory that as the sole owners of the stock they could lawfully dispose of the assets of the corporation; and it is a little difficult to see how if the suit were brought by the Hartman Company itself it could under these circumstances recover the money except as the representative of creditors, and on the ground of a fraud upon them. The trust company made no inquiry as to any action on the part of the board of directors authorizing this disposition of the funds of the company by the president. It undoubtedly had notice from the form of the draft of the Hanover

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National Bank that the draft thus used in paying the debt of Umsted and Kiefer represented the money of the corporation. But assuming that the trust company should have made inquiry in relation to what authority the corporation had given Umsted, if any, over the funds of the corporation, the trust company would be bound by the result of a reasonable, or, as some of the cases put it, a diligent inquiry in regard to the authority of the president. If such inquiry would have led to the discovery of facts justifying the use made of the draft, then the defendant would have the benefit thereof. If such inquiry would have led to discovery of the fact that such use was unauthorized then the defendant cannot justify such use as against the corporation, and even if the information that would thus have been obtained would have been erroneous, but such as the defendant might reasonably believe to be true, still the defendant may justify such use. (*Wilson v. Met. El. R. Co.*, 120 N. Y. 145, 152.)

This draft was commercial paper and the trust company took it in discharge of a debt, and so taking it extinguished the debt and released the collaterals it held. It was, therefore, a holder for value. One who takes commercial paper in extinguishment of a debt, surrendering the note of his debtor and the collateral, whether before or after the note becomes due, is a holder for value. (*Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 223, 224; *Leslie v. Bassett*, 129 id. 525; *Youngs v. Lee*, 12 id. 551, 555; *Cowing v. Altman*, 71 id. 435, 439.)

The question is, did the defendant acquire a good title to the draft? To do so, it must not only have given value, but also must have taken it in good faith.

The trust company's actual good faith is not impugned, or at any rate there is no evidence which is entitled to any weight impugning the position of the officers of the trust company that they actually believed that they were entitled to receive this draft although it represented the moneys of the corporation in payment of the debt of the sole owners of the stock.

In this case, however, if the trust company had made further inquiry with regard to the authority of Umsted to deal with the funds of the company, it would have discovered these facts: That from the twenty-eighth of March, when Umsted went into the

control of the corporation, he took exclusive charge of the affairs of the company, and managed its entire business without any action or interference on the part of the board of directors, negotiating for and purchasing property, real and personal, borrowing money and carrying on its business; that at a meeting of the board of directors held on the twenty-eighth of March the following resolution was adopted: "That the president at once take charge of all the property and business of the company, and that all officers and employees of the company report to him and receive orders from him."

And also the following resolution: "That all of the property of whatever name and nature of this corporation be placed in charge of the president and general manager, and all checks, notes, contracts or other obligations of the corporation be made and signed by the president, or by the secretary and treasurer, and that the signature of one or the other be required on all papers, contracts and other documents executed by the said corporation."

That the board of directors then adjourned, and held no further meeting until after the payment of this loan on the second of August.

Reasonable inquiry, therefore, on the part of the officers of the trust company would have disclosed the fact that Umsted, the president, was during the interval between March twenty-eighth and August second permitted by the board of directors to do any business on behalf of the corporation which the corporation itself might have done by special order of the board; and when it is considered that Umsted, with his associate, Kiefer, were the sole owners of the stock, there is nothing strange or calculated to awaken suspicion in the fact that this absolute trust was reposed in Umsted. The question whether the rights of creditors might possibly be affected by the act comes more properly into discussion under other points, but on the mere question of Umsted's authority to dispose of the assets, even by distributing them among the stockholders, I am of opinion that on the facts known to the trust company and the facts which they would have discovered on inquiry, they were justified in treating the acts of Umsted as the acts of the corporation.

The use which the president of the corporation made of this draft in discharging the note of himself and Kiefer and getting into his possee-

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sion the capital stock of the company was a use which the corporation might properly have authorized for corporate purposes. It was not necessarily, from the point of view of the trust company, as suggested by the learned counsel for the plaintiff, a distribution in the nature of a dividend of the assets among the stockholders Umsted and Kiefer. In fact the real purpose and effect of the discharge of this debt in this way as between Umsted and Kiefer and the corporation was not made known to the trust company, and this use of the draft may have been either of several corporate uses. It may have been the payment of a debt due from the corporation to Umsted and Kiefer for money advanced by them. It may have been a loan upon sufficient security from the corporation to them. It may have been a temporary use of the assets of the company under a special contract to accomplish some object for the benefit of the corporation. It was not, therefore, necessarily, as is argued by the learned counsel for the plaintiff, although it appears in fact to have been, a gift or diversion without consideration of the money of the corporation to other than corporate uses. We may assume that the notice which the trust company had that the money was the money of the corporation from the form of the draft, put the defendant on inquiry as to the authority of Umsted thus to use the draft, that is, on inquiry as to whether the corporation consented thereto. It put the trust company on inquiry as to no other facts. If the corporation could put the money to this use, and it either appeared without inquiry or would have appeared upon reasonable inquiry that the corporation consented to the use of the money, then, on the principles of law applying to commercial paper, the defendant acquired a good title to the draft. It was not bound to inquire further into the details of the arrangement between Umsted and the corporation that had given its consent to the use of the money; nor was it bound to suspect that in making the use of the money which the corporation consented to, Umsted was intending some fraud upon the corporation. There was nothing in the prior dealings between Umsted and the trust company which suggested any fraud on his part. On the contrary, from all the evidence which the trust company had during the prior negotiations for the loan in March, and up to the time of the payment of this note, the trust company had every reason to believe not only that the cor-

poration was a prosperous and going concern with a good business, paying dividends, but that Umsted was a man of high personal and business character. Facts which put a holder or indorsee of commercial paper upon inquiry as to a possible defect of title put such holder or indorsee upon inquiry only in respect to that particular defect. The duty of inquiry extends no further than that defect. Such notice does not open a general duty of inquiry as to any other or any possible defects; and if the particular defect is removed or overcome either by the information received at the time of the transaction or by the information which would have been received by reasonable inquiry, then the title of the holder is good. It is indeed argued by the learned counsel for the defendant that this transaction of the surrender of the stock was in effect a purchase of the stock by the corporation. I am unable to find, however, in the evidence any trace of such a transaction or any evidence of the transaction being so understood by either of the parties. On the contrary, both parties appear to have understood that the stock was surrendered to the debtors Umsted and Kiefer as owners of the collateral upon payment of their note. Nor can I find, as urged by the learned counsel for the defendant, that the subsequent use of the stock in being voted upon for the purpose of an increase of the capital, or its being transferred to a third party for the benefit of the creditors or of the corporation through the intervention of Mr. Chapman after it was discovered that the corporation was in bad financial condition, or its subsequent transfer to the receiver of the corporation for its benefit in any way operates to make this surrender of the stock to Umsted and Kiefer a purchase by the corporation or to estop in any way the plaintiff from maintaining this action if otherwise he could maintain it. What was done with the stock after it was delivered to Umsted and Kiefer was done by them as owners and not in any sense by the corporation. The final surrender of Umsted's interest in the stock seems to have been in consideration of a release of a claim of the creditors against his wife in respect to other property. These questions, however, like many other questions of fact and law that were fully and ably discussed on the trial and summing up of the case are not material to the disposition of the main issues in the case, as I understand them.

II. It is, however, strenuously insisted on behalf of the plaintiff that this action can be maintained on the ground that by this use of the funds of the corporation to the amount of \$125,000, without any consideration therefor inuring to the corporation itself, the remaining assets of the corporation were reduced in value below, and far below, the amount of its authorized capital stock, \$250,000; that this was an act which the corporation itself could not lawfully do because both by the law of New York and the law of Pennsylvania the capital stock in the sense of its available assets to the authorized amount of the capital stock, is a trust fund for the benefit of its creditors which the corporation cannot, while a going concern, dispose of without consideration and which it, therefore, cannot authorize any officer thus to dispose of. The principle of law thus invoked, that the capital stock of a corporation in the sense above referred to is a trust fund for the benefit of its creditors, which is jealously protected by courts of equity, is an undoubted rule for the prevention of fraud which is enforced whenever it becomes properly applicable, and there seems to be no doubt that the law of Pennsylvania and the law of New York agree on this point. The leading case in New York seems to be the case of *Bartlett v. Drew* (57 N. Y. 587), where the principle was enforced as against a stockholder who had received part of the capital, leaving the debts of the corporation unpaid. It was also followed in a similar case in *Hastings v. Drew* (76 N. Y. 16). The rule was applied as to subscribers to stock who had not paid in full in *Wheeler v. Millar* (90 N. Y. 361); and it has been frequently applied as to third parties who have knowingly taken the assets for their own benefit, without consideration inuring to the corporation, and leaving the creditors unprovided for. (*Cole v. M. I. Co.*, 133 N. Y. 168; *Hurd v. N. Y. & C. Steam Laundry Co.*, 167 id. 95.) In the case of *Cole v. M. I. Co.* (*supra*) Judge FENNER thus states the rule: "As against the creditor the transfer to the Millerton Company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against the stockholders and all transferees, except those purchasing in good faith and for value."

But the question of the title acquired by the transferee for value of commercial paper — in this case a negotiable draft belonging to

the corporation — is quite different from the question of the title acquired generally by the assignee of the assets, personal or real, of the corporation. As to the latter, where the transferee is not in a position to claim the benefits of the holder of commercial paper, but is merely a vendee of real or personal property, the title which the vendee gets is ordinarily only the title of his vendor. And if his vendor is the corporation itself and no consideration for the transfer moves to the corporation then the title of the vendee may be impeached by the application of this principle, and certainly so if he has notice that the principle is violated ; and such are most of the cases cited by the learned counsel for the plaintiff to sustain this branch of the case. But the question as to a transferee of commercial paper is not of the actual title the transferor had to convey, but what was his apparent right to make the transfer, and if he had such an apparent right to make a transfer it is no defect in the title of the transferee, a holder for value and in good faith, that the transferor is abusing a trust or committing a fraud, unless the transferee also has notice of such abuse of trust or intended fraud. The notice of a defect or want of power in the transferor, in the case supposed of the corporation, to make a valid transfer must be knowledge of such facts on the part of the transferee that his action in taking the instrument amounted to bad faith. This principle which was the declared rule of the courts in New York has now been made statutory law by the Negotiable Instruments Law. (*Cheever v. Pittsburgh, etc., R. R. Co.*, 150 N. Y. 59 ; *American Exchange Nat. Bank v. N. Y. Belting, etc., Co.*, 148 id. 698, 706 ; *Canajoharie Nat. Bank v. Diefendorf*, 123 id. 202 ; Neg. Inst. Law [Laws of 1897, chap. 612] § 95.)

In this case there was no notice of any such abuse of trust or fraud on the part of the corporation or of Umsted, the president of the company, in the use of the draft in question or any circumstances known to the defendant which amount to such notice to the trust company that by this payment to Umsted and Kiefer the capital of the corporation was reduced below that required by the law of New York or of Pennsylvania to be kept intact for the benefit of creditors. As above stated, during all the negotiation the information received by the trust company up to the time of the payment of this draft on the second of August was in every way favorable

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to the corporation and to its president personally. Even if it be assumed that the disposition made of the draft was not in any way for the benefit of the corporation, which for reasons above stated I think cannot be assumed as a fact known to the defendant, the facts known to the officers of the trust company were not such as to suggest that the effect of this transfer of funds of the corporation to Umsted and Kiefer would leave the capital thus impaired. Much less was there on the part of the trust company any actual knowledge of facts which made their act in accepting the transfer of this draft an act of bad faith toward the corporation or its creditors in this respect. The facts relied upon by the plaintiff's counsel are not sufficient to constitute notice of this character. Great importance is, by the learned counsel for the plaintiff, attached to the way in which the sum of \$125,000 originally loaned to Umsted and Kiefer was divided up. It is argued that what happened at the time of the loan should have made the trust company aware that Umsted and Kiefer were paying only \$110,000 for the stock, and that they were paying large and extraordinary commissions and other expenses to procure the loan, the argument being that such payment of commissions and the mode in which the money was distributed was notice that this was not an ordinary loan or business transaction, or one which a prosperous corporation would resort to, but a borrowing of money under such extraordinary terms and conditions as necessarily to excite suspicion.

The circumstance, however, of the borrower dividing up the money borrowed into various sums for various purposes is too common to excite remark; it is not a matter with which the lender has anything to do, and the fact known to the trust company that in addition to interest at six per cent the borrower was paying a commission of four per cent was not, in my opinion, sufficient to excite suspicion. Beyond this there were no suspicious circumstances in the transaction known to the defendant.

The fact, also, that the trust company was aware that the corporation was borrowing large sums of money at and before the time of this payment, on the second of August, is insisted upon as notice of a circumstance which should have put the trust company on its guard or on inquiry. It is true, as shown by subsequent developments, that Umsted, for the company, borrowed of various banks

during that period large sums of money, and it may be that his conduct of the business of the company, in respect to forming and carrying out plans for the enlargement of the business and the plant, was reckless and unwise, but the fact that he was able on the credit of the company to borrow large sums of money from the banks, which was partly within the knowledge of the trust company at the time, is, it seems to me, rather a fact making in favor of the company and of Umsted's credit than against it. So it is said that Chapman and Plummer were put on the directorate of the corporation to look after the interests of the trust company, and that if the facts known to Chapman and Plummer should be deemed to be known to the trust company, the trust company would have been in possession of information which would have put it upon inquiry. The main facts known to Plummer and to Chapman and not fully known to the trust company were in relation to these borrowings by Umsted on behalf of the corporation; those, however, were facts not discrediting, but enhancing the credit of the corporation and of Umsted, tending to show prosperity, and in no wise, from the point of view of the trust company on the facts within its knowledge, tending to show recklessness or improvidence or a bad financial condition. Moreover, the real question being of the trust company's good faith, it is not perceived how the knowledge of Chapman or Plummer can be held to be the knowledge of the trust company.

On the question of fact, whether this payment did deplete the assets of the company below the capital stock, I think if it were material or could avail the plaintiff it must be found in his favor. The representations made by Umsted at the time he negotiated the loan with the trust company in March, were grossly untrue, with regard to the financial condition and prospects and resources of the corporation. Instead of giving \$350,000 for the stock which was put up as collateral, as represented by him in a letter to the company, he was giving only \$110,000. The condition of the company was by no means as good or prosperous as he caused the defendant trust company to believe. But these facts were only discovered by the trust company long afterwards, and do not in any way tend to impugn the good faith of the officers of the trust company in taking this draft.

As regards this second point on which the plaintiff relies, I think, also, it substantially is a claim that this transfer was a fraud upon the creditors of the corporation, and I think the same principle applies that applies in cases of alleged fraud against creditors of the vendor, that the title of the vendee can only be impeached upon proof of knowledge of the intended fraud or of such facts that the transferee must be deemed to have acted in bad faith.

III. The final claim made by the plaintiff against the defendant is, that this payment to Umsted and Kiefer made the corporation insolvent and unable to pay its debts and, on that ground, that it was a fraud upon creditors. It is a sufficient answer to this claim that the defendant, the trust company, which gave value for the draft had no knowledge or information leading it to believe or suspect that the corporation was thereby made insolvent. If it were material to the case I think it must be found upon the evidence that this payment did make the corporation insolvent. Its financial condition at that particular time, second of August, as affected by this payment, from which, in fact, it received no valuable consideration, cannot with any certainty be shown or deduced from the books of the company or from the testimony. That the company was largely insolvent in November following is undoubtedly true, but the course taken by the banks, who were the principal or only creditors, in abruptly putting an end to Umsted's plans for the reorganization of the business of the company, and their act in procuring the appointment of a receiver were calculated to turn solvency in August, if it existed, into insolvency in November. I think, however, it is true that there was very little substantial value in the assets over the liabilities in August, and the debts had already increased very largely over what they were in March, and if it were a material point in the case it must be found that this loss of \$125,000 made the company insolvent. But for the reasons stated under the former, second point, the judgment must be for the defendant on this point, as the defendant had every reason to believe in the prosperity and solvency of the company, and was not informed of any facts at that time which should have led it to suspect insolvency.

IV. Some other questions of great importance in themselves have been discussed in this case, but, in my opinion, they are not material to the determination of the controlling questions. Some of them

may, perhaps, be properly passed upon in the findings if desired by the parties and deemed material by them.

Upon the whole case I am of opinion that the plaintiff's claim is not sustained and that his complaint must be dismissed on the merits, with costs.

SOORR, J. (dissenting):

In the year 1901 Frank A. Umsted, a salesman in the employ of the Hartman Manufacturing Company, arranged to purchase the whole capital stock of the company of the par value of \$250,000, for the sum of \$110,000. William L. Kiefer, a lawyer, became to some extent interested in the purchase.

In order to procure the money necessary to complete the purchase, Umsted and Kiefer, by the most extravagant overstatements as to the business and condition of the company, the value of its assets, and the price which they had agreed to pay for the stock, induced the City Trust Company of New York to loan them \$125,000. As security for this loan the whole capital stock of the Hartman Company was deposited with the trust company, and placed in the name of one of its officers, and for the further protection of the trust company it was agreed that Elverton R. Chapman, a director of the trust company and one John F. Plummer, who had been active and interested financially in negotiating the loan, should be made directors of the Hartman Company. It was thoroughly understood by the trust company and all those who interested themselves concerning the loan, that it was a personal loan to Umsted and Kiefer, and was made to them in order that they might personally acquire the capital stock of the Hartman Company. Of the \$125,000 loaned \$110,000 was paid to the vendors of the stock, the balance being used in payment of interest in advance, a bonus of \$5,000 to the trust company, and certain commissions. In due course Umsted, Kiefer, Chapman, Plummer and Elton, an employee of the company, were elected directors of the Hartman Company, Umsted being made president, Plummer vice-president, and Kiefer secretary and treasurer. The directors met and adopted resolutions placing the property and business in charge of the president, and authorizing him, or the secretary and treasurer, to sign all notes, contracts and other obliga-

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tions of the company. After the adoption of these resolutions (to be considered more in detail hereafter) the board of directors adjourned and held no further meeting until after the transaction which lies at the foundation of this action. Chapman went to Europe for a protracted visit, and Plummer apparently paid little attention to the affairs and business of the company except to aid in the borrowing of large sums of money from banks in the city of New York. The loan by the City Trust Company to Umsted and Kiefer had been made for six months and fell due September 21, 1901. Umsted and Kiefer conceived the project of acquiring other manufacturing properties to be consolidated with the Hartman Company, and to this end they borrowed, with the assistance of Plummer, and, to some extent, Chapman, considerable sums of money from New York banks. They also applied to the defendant trust company for an increase of its loan, but this was refused, the officers of the trust company being apparently uneasy about the loan, and much more willing to have it paid off than to increase it. On August 1, 1901, the Hanover National Bank loaned to the Hartman Company \$200,000. This loan was negotiated by Umsted, Plummer being present, and was made upon Umsted's statement that he and Kiefer had borrowed *for the Hartman Company* \$125,000 from the City Trust Company upon a promissory note secured by the pledge of the capital stock of the said Hartman Company. He accordingly received from the Hanover National Bank a check upon itself, signed by its vice-president, and drawn to the order of the Hartman Manufacturing Company of Elwood, Penn., for the sum of \$125,000.

This check Umsted indorsed to the City Trust Company, signing the name of the Hartman Company by himself as president and general manager. The City Trust Company accepted this check in payment of its loan to Umsted and Kiefer and surrendered to Umsted the promissory note and the stock of the Hartman Company held as collateral thereto. Shortly thereafter the Hartman Company, by action of its board of directors, increased the capital stock from \$250,000 to \$2,500,000, and the entire issue of the new stock was delivered to Umsted and Kiefer in substitution for the old stock held by them. On November 18, 1901, the Hartman Company failed to meet its

obligations, and one of its notes went to protest, and steps were immediately taken by its creditors to secure themselves so far as possible. The various steps taken to this end it is unnecessary to recapitulate. A reorganization committee was appointed and a board of directors was elected in the interest of the creditors. The claims against the company were assigned to the plaintiff, and all the property of the Hartman Company, except the claim against the City Trust Company in suit here, was sold by order of the directors and bought by plaintiff for the sum of \$238,000, which was credited proportionately in reduction of the several claims of the creditors. There still remained due \$371,140.29, for which plaintiff recovered judgment against the Hartman Company, upon which execution was issued and returned unsatisfied, whereupon the plaintiff brought this action to recover the \$125,000 loaned to the Hartman Company by the Hanover National Bank and diverted to the payment of the personal indebtedness of Umsted and Kiefer to the City Trust Company. The plaintiff appeals from a judgment in favor of the defendant trust company entered upon the report of a referee. Three important facts stand out prominently in the case. They are found by the referee and are not disputed by the respondent. They are, *first*, that the loan to Umsted and Kiefer was a personal loan to them, and was understood by and known to the officers of the City Trust Company to be such; *second*, that the money with which the loan was paid off was the money of the Hartman Manufacturing Company, loaned to it upon its credit; *third*, that the form of the check whereby the loan of the City Trust Company was paid off constituted notice to the trust company that the money represented thereby was the property of the Hartman Manufacturing Company. These fundamental and admitted facts lie at the very root of plaintiff's claim. It is thus made to appear that the City Trust Company knew that it was accepting the money of the Hartman Company in payment of the personal indebtedness of Umsted and Kiefer, and was thus reaping the fruits of an apparent diversion of the funds of the Hartman Company. With this knowledge and notice it was at once put upon its inquiry, and if it chose to accept the money, as it did, without any inquiry at all, it so accepted it at its peril, and if this use of the funds of the Hartman Company was in fact unauthorized, the trust company is liable to

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refund the amount to the corporation or its creditors. (*Rochester & C. T. R. Co. v. Paviour*, 164 N. Y. 281.) From this general proposition we do not understand that there is dissent either by the learned referee or the respondent. It is urged, however, that there are reasons why this general rule is not applicable to the case at bar. It is said that although the trust company should have inquired as to the authority of Umsted and Kiefer, but did not do so, still the failure to make such inquiry will not prevent the respondent from now relying upon such facts as would have been disclosed if a reasonable and proper inquiry had been made. For this there is ample authority (*Wilson v. Met. El. R. Co.*, 120 N. Y. 145), but the limitation of the rule must be strictly observed. *Prima facie* it is unlawful for an officer of a corporation to use its funds in payment of his personal obligations, and the known fact that an officer is so using the corporation's funds certainly raises no presumption that he is authorized to do so, but rather the contrary. The inquiry respecting his authority, therefore, is not whether there is anything forbidding such use, but whether either by some act of the company, or something in the relation between the officer and the company there is anything which justifies such use, and it is not sufficient that the inquiry is merely formal and perfunctory, or addressed to some one not presumptively cognizant of the facts, or who may have an interest in misstating them. When the officers of the trust company were offered the Hartman Company's money in payment of the personal indebtedness of Umsted and Kiefer, they were called upon to make a reasonably careful and intelligent inquiry as to the authority for such an apparent diversion of the company's money. The place to look for such authority was the minutes of the board of directors, upon which the trust company had expressly stipulated that it should have two members to safeguard its interests.

Such an inquiry would have disclosed the fact that such authority had never been given to the board unless it could be spelled out of the following resolution adopted at the first meeting after Umsted and Kiefer had obtained control of the company: "*Resolved*, that the president (Umsted) at once take charge of all the property and business of the company, and that all officers and employees of the company report to him and receive orders from him."

"*Resolved*, that all of the property of whatever name and nature

of this corporation be placed in charge of the president and general manager, and all checks, notes, contracts or other obligations of the corporation be made and signed by the president, or by the secretary and treasurer, and that the signature of one or the other be required on all papers, contracts and other documents executed by the said corporation." These resolutions, which are to be read together, certainly gave to Umsted the most complete control over the business of the corporation and over its funds and property in connection with its business, but there is nothing whatever in the language of the resolutions, or in the intent so far as it can be derived from the language, to justify the conclusion that the directors had authorized Umsted and Kiefer to divert the company's money to the payment of their own personal obligations. Certainly there is no such apparent authority as was given to the president of the defendant in *Bank of New York N. B. Assn. v. Am. Dock & Trust Co.* (143 N. Y. 559) to sign warehouse receipts, or to the defendant in *Rankin v. Bush* (93 App. Div. 181) to certify checks. If then the trust company had made proper inquiry they would have found in the minutes of the board of directors no justification for the use of the Hartman Company's money for the payment of the debts of Umsted and Kiefer, and they could have found no such authority anywhere, for the fact was that no such authority existed, and no amount or extent of inquiry could have disclosed any. We are, therefore, unable to find any foundation for the view expressed by the learned referee that the City Trust Company is to be considered as having received the money of the Hartman Company in what is known to the law as good faith. That its officers were guilty of actual, intentional fraud is not claimed, but it is clear that they were guilty of a legal fraud upon the Hartman Company and its creditors, for it appears that the payment of \$125,000 to the trust company largely impaired the capital of the Hartman Company, which then owed various banks upward of \$386,000, and in effect rendered it insolvent. Unless there is something in the present case exempting it from the general rule, the facts as thus far stated required a judgment for the plaintiff. (*Rochester & C. T. R. Co. v. Paviour, supra*; *Gerard v. McCormick*, 130 N. Y. 261; *Cohnfeld v. Tanenbaum*, 176 id. 126.)

That the payment was made by what is known as a cashier's

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check is of no significance except that, as already noted, its very form conveyed notice of the apparent diversion. It is argued that the act of Umsted and Kiefer was afterwards ratified by the Hartman Company. It seems to be more than doubtful whether or not, under the circumstances, the company could lawfully and effectually, as against its creditors, have ratified an act which impaired its capital. However this may be there is no evidence of ratification, for it does not appear that any director save Umsted and Kiefer knew of the diversion. It is also strongly urged upon us that the Hartman Company was what is known as a "one man corporation," and that owing to this fact the trust company was justified in treating Umsted and Kiefer, the owners of the whole capital stock, as if they were in fact the company, and was also justified in assuming that they had authority to deal with the funds and assets of the company as their own. Undoubtedly there are cases wherein the assent of all the stockholders of a corporation is to be taken as against them, as the assent of the corporation itself, for it would be manifestly unjust for the stockholders to repudiate in their corporate capacity, and for their own benefit, that which they assented to as individuals. But this principle is applicable only, and is applied only where there are no interests to be considered except those of assenting stockholders, and can have no application where the rights of non-assenting creditors are concerned. In *Little v. Garabrant*, (90 Hun, 404; *affd.*, 153 N. Y. 661), which was an action by a receiver of a corporation, the court said: "In his capacity as trustee for the corporation he would not be precluded from a successful prosecution of the action, because of the assent of all of the stockholders to the use of its funds for purposes outside of the business of the corporation, provided it were the fact that the corporation was insolvent at the time such payments were made." The referee has expressly found that the diversion of the \$125,000 not only impaired the capital of the Hartman Company, but rendered it insolvent.

Ordinarily a corporation can act only through its directors, and it is only under special and unusual conditions that the assent of the individual stockholders may be taken in place of action by the directors, and certainly, when the rights of creditors intervene, the individual stockholders cannot make a disposition of the corporate

funds which the directors as such could not lawfully make. Primarily the capital of a corporation is held for the protection of its creditors and impressed with a trust in their behalf, and the directors cannot lawfully, nor can the stockholders, divert the funds of a corporation to the individual use of its members, if thereby the capital is impaired and the corporation rendered insolvent. (*Hurd v. N. Y. & C. Steam Laundry Co.*, 167 N. Y. 89; *Germania Safety Vault & Trust Co. v. Boynton*, 71 Fed. Rep. 797; *Matter of Prospect Worsted Mills*, 126 id. 1011; *National Trust Co. v. Miller*, 33 N. J. Eq. 155.) It is no answer to say that the trust company had no knowledge or notice that the Hartman Company had other creditors, or that the diversion of the \$125,000 would impair its capital. It was bound to inquire. If it chose to treat Umsted and Kiefer as being in fact the corporation, and to rely upon their authority to divert the company's funds as a substitute for the authority of the corporation expressed in the usual and customary way, it acted at its peril, not perhaps as against the stockholders with whom it was dealing, but as against existing creditors. It had carefully stipulated for representation in the board of directors, thereby securing a source from which it could gain information as to the affairs and condition of the company, and yet neglected to resort to that source of information when an unusual and suspicious situation was presented. Because it willfully closed its eyes and refused to make any inquiry it cannot now escape liability because it did not know that which an inquiry would have made apparent.

For these reasons the judgment appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

McLAUGHLIN, J., concurred.

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MARY ELIZABETH PAUL, Appellant, v. SIMEON FORD and SAMUEL T. SHAW, Copartners in Business under the Firm Name of FORD & SHAW, Respondents.

First Department, January 25, 1907.

Pleading — actions for assault and slander cannot be united.

A complaint alleging that the plaintiff was assaulted by the defendant's servants, who then and there falsely spoke concerning the plaintiff scandalous and defamatory words and that by reason of the assault the plaintiff was made sick, etc., and that by reason of the slanderous words was greatly injured, all to her damage, etc., improperly unites causes of action for assault and slander. A motion to compel the plaintiff to separately state and number such causes of action should be granted.

It seems, however, that said actions cannot be united in one complaint, not being actions arising out of the same transaction within the meaning of the statute.

APPEAL by the plaintiff, Mary Elizabeth Paul, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of December, 1906, directing the plaintiff to amend her complaint by stating separately a cause of action for assault and a cause of action for slander.

Benjamin Reass, for the appellant.

John C. Gulick, for the respondents.

INGRAHAM, J. :

The complaint alleges in one paragraph that on the 10th of August, 1906, the defendants, their agents, servants and employees violently assaulted this plaintiff and violently caught and struck her about her arms and body, and did beat, bruise, wound and ill-treat the plaintiff; and then and there in the presence of divers persons did falsely and maliciously speak and declare of and concerning the plaintiff certain false, scandalous and defamatory words.

It is further alleged that the statements so made by the defendants were false and untrue, and were made by the defendants maliciously, and that by reason of the aforesaid assault the plaintiff has

been made sick, sore, disabled and distressed, and has suffered severe nervous shock, and that by reason of the slanderous words uttered as aforesaid plaintiff has been greatly injured, all to her damage in the sum of \$5,000. There is thus alleged, as part of the same cause of action, an assault upon the plaintiff's person and the speaking of slanderous and defamatory words which together caused the plaintiff the damage for which she seeks to recover.

There are here two causes of action, one for assault and one for slander, which, under section 484 of the Code of Civil Procedure, could not be united in the same action, and under section 483 of the Code of Civil Procedure such causes of action must be separately stated. The latter section provides that "where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered." This motion was, therefore, properly granted, and the question whether or not these two causes of action can be united is not presented.

That these causes of action are separate is recognized by section 484 of the Code of Civil Procedure, which provides that "The plaintiff may unite, in the same complaint, two or more causes of action, * * * where they are brought to recover as follows: * * * 2. For personal injuries, except libel, slander, criminal conversation or seduction. 3. For libel or slander." By subdivision 9 of section 3343 of the Code of Civil Procedure "a 'personal injury' includes libel, slander, criminal conversation, seduction and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another." An action for assault, therefore, being a personal injury, comes within subdivision 2 of section 484 of the Code of Civil Procedure. An action for slander comes within subdivision 3 of section 484 of the Code of Civil Procedure. Thus causes of action for an assault and for libel or slander are stated as separate causes of action.

In the case of *Anderson v. Hill* (53 Barb. 238), where, as here, the plaintiff alleged an assault and the speaking of slanderous words at the same time, there was a demurrer to the complaint, on the ground that causes of action were improperly joined, and the court held that that complaint stated facts constituting a clear cause of action for assault and battery and also a clear cause of action for

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a verbal slander, both in a single count, and that two causes of action were alleged and that they were improperly united. The court said: "The causes of action are not separately stated, as required by the Code,* and every other tolerable system or idea of pleading, but both are intermingled and woven together in a single fabric of manual and vocal tort. Causes of action for words and blows thrown into 'hotchpot' and counted upon in that condition. Nothing is claimed as damages for the injury arising from the battery as such, and nothing from the injury arising from the slander. Neither cause is claimed to have injured separately, but the injury and consequent damages spring from the union of the two wrongs. Should a verdict be rendered in the plaintiff's favor, it must necessarily be a single verdict, and it would not appear and no one could ascertain, not even the parties themselves, how much the plaintiff had been injured in person or how much in character, nor what measure of compensation had been awarded for either injury. Surely justice ought not to be so administered unless the statute imperatively requires it."

In *De Wolfe v. Abraham* (151 N. Y. 187) the complaint alleged a cause of action for slander and a cause of action for false imprisonment, the acts of the defendants complained of happening at the same time and being part of a single occurrence. The court held that these two causes of action could not be united in one proceeding. It was said that "false imprisonment is an injury to the person and is embraced within subdivision 2, while slander is in express terms excluded therefrom and placed in subdivision 3. * * * It does not follow that two causes of action, originating at the same time, arose as matter of law out of the same transaction or are proved by the same evidence." (Citing *Anderson v. Hill*, 53 Barb. 245, 246.)

In the plaintiff's cause of action as alleged there were at the same time and as part of the same occurrence two wrongs inflicted upon her which under the Code of Civil Procedure are designated personal injuries, one of which was an assault and the other a slander. It does not necessarily follow that the claim for damages resulting from these personal injuries arose out of the same transaction so as to bring the

* See Code Proc. § 167, revised in Code Civ. Proc. §§ 483, 484.—REP.

case within subdivision 9 of section 484 of the Code of Civil Procedure. Although the occurrences happened at the same time, the transaction which gives a cause of action in the one case was physical force used against the person of the plaintiff, while in the other case was words reflecting upon her character constituting what is known as an action for slander, the transaction in the one case being the assault upon the person and in the other the actionable words spoken. These two injuries each giving a cause of action, the transaction giving each cause of action was the wrongful act of the defendants, but such acts were not the same transaction. For each of these wrongs the law awards the plaintiff a separate cause of action, and as they are not both included within any one subdivision of section 484 of the Code of Civil Procedure they cannot be united in one action.

It follows that the order appealed from must be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARGARET WEICK, Appellant, v. THE WARDEN OF THE CITY PRISON OF THE CITY OF NEW YORK, Respondent.

First Department, January 25, 1907.

Court — continuation of Trial Term — criminal jurisdiction not lost thereby — when habeas corpus not proper remedy.

There is nothing in the Codes or Constitution which prevents the continuation of a Trial Term beyond the duration of the original time set, even though in the meantime another term of the court is appointed to be held. In fact the provisions of section 45 of the Code of Civil Procedure and section 432 of the Code of Criminal Procedure authorize the continuation of a term beyond the expiration of the time appointed.

Hence, a court whose term is continued into the period when another term is held does not lose jurisdiction to try one indicted for a crime.

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The person indicted for crime has no constitutional right to be tried in one court room rather than in another in the same county, and hence an objection to jurisdiction on such ground is without merit.

A judgment of conviction will not be set aside upon mere technical objections, if the rights of the accused have been fully protected, and the errors do not affect a substantial right.

In any event, habeas corpus is not a proper remedy by which to contest the jurisdiction of the court upon the ground that its term was unlawfully continued. If the judgment be irregular, the proper proceeding is by a motion for arrest of judgment or by an appeal.

APPEAL by the relator, Margaret Weick, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of January, 1907, dismissing a writ of habeas corpus theretofore issued in behalf of the relator and remanding the said relator to the custody of the defendant.

Edward Hymes for the appellant.

Robert C. Taylor, Assistant District Attorney, for the respondent.

INGRAHAM, J. :

A Trial Term of the Supreme Court was appointed by the Appellate Division of this department, to commence on the first Monday of November, 1906, and to that court Mr. Justice GREENBAUM, a justice of the Supreme Court, was assigned. He presided in that court during the month of November, and at the end of that month, on the application of the district attorney, an order was entered which recited that, "it appearing to the Court, from the statements of the District Attorney of the County of New York, and from the indictments filed by the Grand Jury of the County of New York, and triable in this court, that the public interests require that the November, 1906, Term of this Court be continued." It was, therefore, ordered that "this November, 1906, Term be and the same is hereby continued to and until the third day of December, 1906, and thereafter until such business as may be and be brought before this Court is disposed of." A Trial Term of the Supreme Court had been appointed by the Appellate Division of this department, to commence on the first Monday of

December, 1906, and thereafter during the month of December both the continued November term and the December term transacted business in the county of New York.

On the thirtieth of November, when the order was made continuing the November term, an unfinished case was on trial, which case was continued until the 11th of December, 1906, and on the 12th of December, 1906, this relator, who had been indicted by the grand jury for manslaughter in the first degree, was tried in the continued November term, which trial resulted in her conviction; after her conviction the defendant, for the first time, objected to the jurisdiction of the court, on the ground that the term had ended with the month of November or upon the conclusion of the trial which had been commenced during that month, and the court was, therefore, without jurisdiction to commence a new trial after the commencement of the December term of the Supreme Court, and then moved for arrest of judgment on this ground. That motion having been denied, the relator obtained a writ of habeas corpus, claiming that the court had no jurisdiction to try the relator and asking that she be discharged. Upon the hearing at the Special Term this writ of habeas corpus was dismissed and the relator appeals.

It is not disputed but that the term of the Supreme Court was properly appointed by the Appellate Division in pursuance of the authority contained in the 6th article of the Constitution and section 232 of the Code of Civil Procedure. It was presided over by a justice of the Supreme Court as provided by the Constitution assigned to preside over that term by the Appellate Division of this department. There can be no question, therefore, but that it was a legal court legally constituted and competent to try this relator for the offense charged, unless it ceased to be a term of the Supreme Court on the 1st Monday of December, 1906, when the December term of the court was appointed to be held, or upon the completion of a trial that was unfinished at that time. There is no provision in the Constitution or in the Code of Civil Procedure which limits the duration of a term of the Supreme Court once duly appointed to be held, and the duration of the term was not limited by the appointment for this term made by the Appellate Division of this department. It is true that on the first Monday of December a new Trial

Term was appointed to be held in the county of New York, but in the absence of an express provision of the Constitution or the law of this State, there appears to be no reason why a new term should, of itself, terminate a term theretofore established. The provisions of section 45 of the Code of Civil Procedure and section 432 of the Code of Criminal Procedure which provided that a term of the court can be continued notwithstanding the expiration of the time appointed for the term to continue a trial, are intended to apply to cases where a time is fixed for the expiration of the term either by some express provision of law or by the authority authorized to appoint the terms of courts. As there was no time fixed at which the November term of the Trial Terms of the Supreme Court should end, the term continued until regularly adjourned by the justice designated to hold the term, or, in his absence, some other justice of the Supreme Court. In the county of New York there had been thirteen Trial Terms of the Supreme Court appointed for the month of November, and also thirteen Trial Terms of the Supreme Court appointed for the month of December. Of these, Part 1 of the Trial Term was designated as the term for the transaction of criminal business. But, as before stated, there was nothing either in the Constitution or the statute or in the appointment of the terms which provided when a term thus established should terminate, and thus each term continued until it was regularly adjourned without day.

If legislative authority was necessary in the absence of a prohibition, we think that is furnished by section 232 of the Code of Civil Procedure, which provides that "Two or more Trial Terms may be appointed to be held *and may be held* at the same time in any county. A Trial Term in any county may be held in two or more parts, and a jury panel may be summoned to serve in each part, or jurors may be drawn from one panel." Provision is here expressly made for the holding at the same time of two or more Trial Terms in the same county, and thus, under the system established in this State, there can be no objection to a continuance of one term of the Supreme Court after a new term has commenced. The right of a term of the Supreme Court to continue its term from day to day is expressly recognized in *People v. Sullivan* (115 N. Y. 185), for it was there held that there is an inherent power in the court to

adjourn its proceedings from day to day as long as it is necessary to finish the business legitimately brought before it, unless by the terms of some statute its existence is sooner brought to a close. And this same principle was affirmed in *People v. Youngs* (151 N. Y. 210).

The appellant relies upon authorities from other States which have held that a term of the court ended upon the commencement of a new term, but this is put upon the *express* ground that otherwise two terms of the same court would be held at the same time. But in this State the Legislature has expressly overcome this objection by allowing two terms of the same court to be held at the same time. I think, therefore, the objection is without merit and that a term of the Supreme Court once established as provided by the Constitution and the Code of Civil Procedure, continues until it is adjourned without day, and the fact that in the meanwhile another term of the court is appointed to be held has no effect upon the continued term.

The relator also claims that the court lost jurisdiction to try the relator because, during the trial, the accommodations in the Criminal Court Building being inadequate for the work to be done, continued the trial in one of the court rooms of the County Court House in which it has been the custom to hold the terms of the Supreme Court in which civil cases were tried. But both the Criminal Court Building and the County Court House constituted the court house in the county of New York. These Trial Terms of the Supreme Court were appointed to be held at the court house in the county of New York. A person indicted for crime has no constitutional right to be tried in one court room rather than in another in the same county, and there could be no possible disadvantage to the relator, and none is alleged, in the change of court rooms, whether the rooms were in one or more buildings. We think the objection entirely without merit. The time has passed in this State when a person indicted for crime, having been tried by a court organized as required by the Constitution, presided over by a judicial officer duly elected to preside, and where all the rights of the accused have been carefully preserved and guarded, may have his conviction set aside upon a technical claim such as that presented. The case of *Northrup v. People* (37 N. Y. 203) has

no application. There the prisoner was entitled to be tried by a jury drawn from the inhabitants of the town in which the court was appointed to be held, and the justice in adjourning the trial from one town to another town of the same county and drawing a jury from the town to which the trial had been adjourned violated a right of the prisoner which the court held required that a new trial should be granted. There was thus a very different question from that presented upon this appeal. But whatever was held in that case, under the present law of this State the substantial rights of a prisoner accused of crime are considered, and mere technical objections are not allowed to invalidate a judgment entered after a judicial proceeding in which the rights of the accused have been fully protected, and the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Proc. § 542.) It is also quite apparent that this question cannot be raised by habeas corpus. The relator is held under a judgment of the Supreme Court of the State of New York based upon a conviction by a jury of the crime of manslaughter in the first degree. If the judgment was for any reason irregular the proper proceeding was by a motion for arrest of judgment, or by an appeal from the judgment. If there was a mistrial, in no event would the relator be entitled to a discharge. These objections were mere irregularities which were waived, as no objection was taken by the relator at the time. In any aspect of the case the writ of habeas corpus was properly dismissed.

It follows that the order appealed from must be affirmed.

PATTERSON, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Order affirmed. Order filed.

In the Matter of the Application of the BOARD OF RAPID TRANSIT
RAILROAD COMMISSIONERS. (Modification of Park Avenue Section.)

First Department, January 25, 1907.

**Eminent domain — municipal corporation — injury to abutting owners
by construction of underground railway — counsel fees and necessary
expenses allowed.**

The granting of the application of the rapid transit commissioners of the city of New York to legalize an unauthorized use of Park avenue for an underground railway is in the discretion of the court, and where the use of such street has caused actual damage to abutting owners, the court in its discretion will award the property owners a reasonable amount for the expenses in ascertaining the amount of damage to which the property has been subjected. The award should include compensation for counsel, taxable costs and other disbursements necessary for the proper presentation of the case to the court. A reasonable counsel fee is five per cent upon the amount of the award made to each owner, not exceeding \$1,000 in any case.

APPLICATION to confirm the report of a referee.

John M. Bowers, for Welles, Girard and others, claimants.

Arthur H. Masten, for Charles T. Barney and others, claimants.

Charles Gibson Bennett, for A. D. Huntington, claimant.

Harrison & Byrd, for George H. Byrd, claimant.

Gilbert H. Crawford, for Frederick W. Devoe, claimant.

Edward M. Shepard, for Board of Rapid Transit Commissioners.

INGRAHAM, J. :

This court having determined that before formal approval should be given to the report of the commissioners approving of the use of the east side of Park avenue between Thirty-fourth and Forty-second streets for the underground railway, the owners of abutting property on Park avenue should be paid the damages that the actual construction of the unauthorized tunnel has caused to the abutting property (104 App. Div. 468); the entry of a final

order confirming the report of the commissioners was postponed until the amount of such actual damage could be ascertained. The application now comes before the court for a final order based upon the report of a referee as to the amount of such actual damage.

The learned referee in a very satisfactory report has ascertained and reported the amount of damage occasioned to abutting property by the unauthorized acts of the board of rapid transit commissioners and its contractor in constructing the tunnel. The learned counsel for the rapid transit commissioners has filed no exception to the report of the referee and makes no objection to the various amounts which the referee has reported as the damage to such abutting property. It is sufficient to say that we adopt the conclusions of the referee.

The referee excluded all evidence as to legal expenses occasioned by the efforts of the owners of abutting property to enjoin the construction of the tunnel or in opposition to the granting of this application, but he reported that it seemed to be entirely feasible to treat this proceeding, so far as it relates to each claimant, as an independent special proceeding, and, as there is a recovery by each, the court could direct that each independent claimant should have his costs and disbursements and an extra allowance based upon the amount of his recovery in this proceeding, and he recommended that such an allowance be made.

I can see no reason why it is not proper in a proceeding of this character to add to the amount awarded to each property owner a reasonable amount for the expense of the proceeding to ascertain the amount of the damages to the abutting property. The board of rapid transit commissioners applied in this proceeding for a consent to legalize an unauthorized use of the public street. Whether or not such a consent should be granted rests largely in the judicial discretion of the court who is to consider the rights of the abutting property in the street and the right of the public at large to have the street applied to a public use. In determining whether such a consent should or should not be given, where it appears that the use of the street had actually caused serious damage to abutting property in constructing the railroad for the benefit of the entire city, and where the amount of such damage can be defi-

nitely ascertained, it is the duty of the court to require that such damage be paid before the use of the street is authorized. Where it was necessary for an abutting property owner to employ counsel and incur expense so as to definitely ascertain the amount of the damage to which the abutting property has been subjected, the reasonable cost thereof is as much an item of damage as the actual cost of repairs to the abutting property necessary to replace the building in the same condition that it was before the unauthorized use of the street. It seems to me, therefore, that, irrespective of any express authority to award costs in this proceeding, the court should award to the owner of each piece of abutting property a reasonable sum for compensation for counsel, and for the other disbursements necessary for the proper presentation of the case to this court and to the referee in this proceeding. Under these circumstances I think a reasonable counsel fee to each of the parties who have appeared before the referee would be five per cent on the amount of the award to the owner of each piece of abutting property, not exceeding, however, in any one case the sum of \$1,000.

The report of the referee, therefore, stands confirmed, and the final order confirming the report of the commissioners will be entered upon the payment to each of the owners of the abutting property of the amount found by the referee as the damage caused to their property, together with the taxable costs and disbursements of the proceedings and an allowance for counsel fee to the amount above expressed. Upon proof of the payment of these amounts, counsel for the petitioner may present an order confirming the report of the commissioners appointed in this proceeding.

PATTERSON, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Report of referee confirmed; order directed to be entered on conditions stated in opinion. Settle order on notice.

LOUIS LEVY, Respondent, v. SOPHIE KNEPPER and Others,
Appellants.

First Department, January 25, 1907.

**Equity — specific performance — money damages in lieu of performance
— finding of inability of defendant to perform is prerequisite**

A suitor's right to specific performance is founded on his right to equitable relief. If upon trial it appears that he is entitled to equitable relief, it will be decreed. If, however, it appears that in consequence of the condition of the title specific performance cannot be decreed, the action is then reserved for trial as an action for damages for a breach of contract, and will either be sent to a jury or tried and determined by the court as the circumstances require. But before the court can give a money judgment, it must decide that specific performance cannot be awarded. Hence, a decree which awards specific performance or money damages in the alternative without finding as a fact that specific performance is impossible is unauthorized.

APPEAL by the defendants, Sophie Knepper and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of April, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

Joseph Rosenzweig, for the appellants.

Harry A. Gordon, for the respondent.

INGRAHAM, J.:

This action was brought for the specific performance of a contract for the conveyance of real property by which the defendant Sophie Knepper agreed to convey to the plaintiff certain premises in the city of New York for the sum of \$19,000; of this amount \$450 was paid upon the execution of the contract; \$16,000 was to be paid by conveyance of the property subject to an existing mortgage; \$1,500 by the execution of a purchase-money mortgage, and the balance of \$1,050 in cash upon the delivery of the deed.

The complaint alleges that after the execution of the contract the vendor executed a mortgage to the defendant Weis and subsequently conveyed the property to the defendant Reichman; that such deed and mortgage were made and caused to be recorded without consideration and solely for the purpose of hindering and delay-

ing the plaintiff and to prevent him from obtaining the specific performance of the contract of sale. As part of the relief the plaintiff demands judgment that the said mortgage and deed be vacated and set aside and that the defendant Knepper be compelled to specifically perform the said contract of sale, or in case the defendant Knepper shall be unable to perform the same the plaintiff asks judgment for the sum of \$2,640 damages.

The answer admits the execution of the contract and denies the other allegations of the complaint, alleging that at the time and place where the deed was to be delivered she was ready and willing and offered to carry out the said contract, but that the plaintiff refused to perform and would not accept a deed of the premises, and that she thereafter executed the mortgage and conveyed the property.

Upon the trial the court filed a decision sustaining the plaintiff's allegations and directing judgment that the mortgage and deed be adjudged and declared fraudulent and null and void as against the plaintiff and that the same be set aside and canceled of record; that the defendant Knepper specifically perform the contract, and in the event that the defendant Knepper is not able and cannot perform the said contract the plaintiff is entitled to judgment for the sum of \$3,450, and that this amount be impressed and declared a lien upon the premises and upon all proceeds realized upon the sale of the said property pursuant to any foreclosure sale in the hands of the city chamberlain, and that the defendant Knepper be adjudged to pay any deficiency which may remain after applying the said proceeds to the payment of the said sum of \$3,450. Judgment was entered in accordance with this decision, and from such judgment the defendants appeal.

There is no provision in the judgment for determining whether or not the defendant Knepper is able to perform the said contract. The defendant Knepper is directed to specifically perform the contract, and then follows the provision that "in the event the defendant Sophie Knepper is not able and cannot perform, pursuant to the contract of October 30th, 1903, that the plaintiff is entitled to a judgment herein wherein and by which it shall be adjudged and decreed that the plaintiff have and recover from the defendant Sophie Knepper the sum of \$3,450, besides costs, and that the same

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be impressed and declared a lien on the said premises No. 226 East Eighty-ninth street, and that the same be impressed and declared a lien upon all proceeds realized upon the sale of the said property, pursuant to any foreclosure proceeding or otherwise, in the hands of the City Chamberlain or elsewhere."

The court found that at the time the contract was to be performed the plaintiff was ready, willing and able to carry out the contract and offered to pay to the defendant Sophie Knepper the balance of the purchase price according to the terms of the contract, but that the defendant Knepper, although fully able to carry out the contract on her part, with a view of depriving the plaintiff of the benefits of the said contract and bargain, failed and refused to carry out and perform the contract on her part; that subsequently said defendant failed to pay the interest due on the prior mortgage upon the premises, whereupon an action was commenced to foreclose this mortgage, which action of foreclosure was pending at the time of the trial of this action. There is no finding that the defendant at the time of the trial of the action was not able to complete the said contract, nor did the court determine whether or not the defendants' title to the property was good, so that a conveyance would vest in the plaintiff a good title to the property, subject to the incumbrances specified in the contract.

It is quite evident that this judgment cannot be sustained. In an action for the specific performance of a contract to convey real property a court of equity obtains jurisdiction for the purpose of decreeing specific performance. If it should appear upon the trial that the defendant is unable to perform the court retains jurisdiction and awards the plaintiff damages caused by the breach of the contract. But the judgment awarded must be either for a specific performance or upon finding that the vendor is unable to perform, for the damages sustained by reason of the failure of the vendor to perform the contract. It was stated on the argument that since the entry of this judgment the action of foreclosure to enforce the first mortgage upon the property had proceeded to judgment and the property sold, and in consequence thereof the defendant was unable to make the conveyance as required by the contract, in which event the plaintiff was entitled to a money judgment against the vendor for the damages sustained. There is, however, no fact found upon

which we could base a judgment for the damages that the plaintiff has sustained, and the situation so disclosed by the evidence is not such as would justify the court, on these findings, in modifying this judgment by changing it into an action for damages.

In *Haffey v. Lynch* (143 N. Y. 241) it is said: "It is a general rule in equity that the specific performance of a contract to convey real estate will not be granted when the vendor, in consequence of a defect in his title, is unable to perform. * * * But if the defect in the title existed at the date of the contract, or was due to some fault or to some act of the vendor subsequent to the contract, the court will generally entertain an action for specific performance and retain jurisdiction for the purpose of awarding damages for the breach of the contract. But where, as in this case, the defect in the title arises after the making of the contract, without any fault of the vendor, and the vendee knew of the defect in the title when he commenced his action, it was formerly the rule that the court would not retain the action for the purpose of awarding damages. * * * This rule was adopted because the vendee should not commence a fruitless action in equity simply to recover there his damages for a breach of contract. The rule has been modified since the Code practice which authorizes the joinder of legal and equitable causes of action, and while the equitable relief will be denied in such a case, now the action will be retained, and the issue as to the breach of contract and damages will be sent to a jury for trial. * * * Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions." In *Sternberger v. McGovern* (56 N. Y. 12) the question of reserving a cause of action for damages where an action has been commenced for specific performance, where it appeared that the defendant could not specifically perform, was considered, and the court said: "This shows that when the complaint states facts giving an equitable cause of action, and also a legal cause of action, arising out of the same transaction, the party is entitled to have both tried, if necessary to obtain his rights. That is this case. The complaint sets out the contract and alleges a tender of performance by the plaintiff and a breach by the defendant, and demands judgment for \$125,000 and other relief. True, he demands equitable relief,

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based upon the ground that he was entitled to a specific performance of that part of the contract relating to the Thompson street property. He failed in showing a right to this. He then had a right to a trial of his claim for damages sustained by the breach. True, the mode of trial may be different. The former must be tried by the court or a referee, unless some question or questions of fact involved are ordered by the court to be tried by jury. Either party has the right to a jury trial of the latter. This creates no practical difficulty. The one issue may be tried by the court, and the other by jury, if the ends of justice require the trial of both, or both may be tried by the court or a referee if the parties so desire."

The foundation, therefore, of an action in equity for specific performance is the right of the plaintiff to equitable relief. If upon the trial it appears that the plaintiff is entitled to that equitable relief, such relief will be decreed; if, however, on the trial it appears that in consequence of the condition of the title a decree of specific performance cannot be decreed, the action is then to be reserved and tried as an action for damages for breach of a contract, and either to be sent to a jury for trial or tried and determined by the court as the situation requires. But before the court can retain the action to recover the damages for breach of a contract, it must decide the question whether or not a decree for specific performance can be awarded. And it is only in a case where a decree of specific performance cannot be awarded that the court is justified in denying that relief and retaining the action as one to recover damages for the breach of a contract. These rules are simple and elementary, and were violated in the trial of this case. Here it was the duty of the court to determine whether a decree for specific performance should or should not have been granted, and it was only in the event that such specific performance could not be granted that the court was justified in continuing the action as one for damages.

The judgment is therefore reversed, and a new trial ordered, with costs to the appellants to abide the event.

PATTERSON, P. J., McLAUGHLIN and LAMBERT, JJ., concurred; HOUGHTON, J., concurred in result.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LEON C.
WEINSTOCK, Appellant.

First Department, January 25, 1907.

**Game Law — section 27 of the Forest, Fish and Game Law construed —
sale of foreign grouse without giving bond prohibited.**

By the amendment to section 27 of the Forest, Fish and Game Law made by chapter 580 of the Laws of 1904, the selling of foreign grouse and woodcock is prohibited unless the persons selling them or offering them for sale have given the bond required by said section. Said section, as amended, does not merely make the possession or sale of grouse without giving a bond presumptive evidence that they were taken within the State, but absolutely prohibits the sale of foreign birds without giving a bond.

APPEAL by the defendant, Leon C. Weinstock, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of June, 1906, upon the decision of the court rendered after a trial before the court without a jury at the New York Trial Term.

William Victor Goldberg, for the appellant.

Robert C. Beatty and *Selah B. Strong*, for the respondent.

SCOTT, J. :

The judgment now appealed from was entered upon an agreed state of facts showing that on the 16th and 24th days of November, 1905, defendant offered for sale and sold in the city of New York certain grouse which had not been taken in the State of New York nor within twenty-five miles of the State line, and that said defendant had not given the bond specified in and required by section 27 of the Forest, Fish and Game Law of this State. (See Laws of 1900, chap. 20, added by Laws of 1903, chap. 291, and amd. by Laws of 1904, chap. 580 and Laws of 1905, chap. 335.) The appeal raises a question as to the proper construction and effect to be given to said section as amended by chapter 580 of the Laws of 1904 which, with the addition of the words "or offered for sale" in the second line of the italicized quotation below, was continued by chapter 335 of the Laws of 1905.

Prior to that amendment the section prohibited the sale or offering for sale within this State of woodcock or grouse taken in the State, and provided that the mere possession of such game birds by any person should be presumptive evidence that they were taken within the State, unless the person possessed of them had given the commissioner a bond conditioned that the person giving it should not knowingly have in his possession or sell grouse or woodcock taken in the State, and containing such other provisions as to inspection of grouse or woodcock possessed by him, evidence that the same were taken without the State, by way of bill of sale, way bill or otherwise, and generally such requirements as the commissioner might deem necessary for the enforcement of the section. As the statute then stood it provided a rule of presumption only. Grouse or woodcock taken within the State might not be sold at all, but similar game birds taken without the State might be sold within the State.

If a person was found in the possession of grouse or woodcock, the presumption whether or not they had been taken in this State depended upon whether or not a bond had been given. If no bond had been given the presumption was that they had been taken in the State, but if a bond had been given no such presumption attached. In 1904 the section was amended so that the first sentence thereof read as follows: "Grouse and woodcock taken in this State shall not be sold or offered for sale within this State or carried without the State, *nor shall grouse or woodcock taken without the State be sold within the State except pursuant to the provisions of this section*" — the amendment consisting of the insertion of the italicized words. The contention of the appellant is that the section, as thus amended, still furnishes only a rule of presumption, and, in effect, that the amendment has added nothing to the section as it formerly stood. With this view we are unable to agree.

Before amendment, the section did not undertake in any case to forbid the sale of foreign grouse or woodcock. Now it contains prohibitive words, and makes such sale or offering for sale unlawful except under certain conditions. What is the exception? The words of the statute are, "except pursuant to the provisions of this section." Reading further in the section we find provision made for the giving of a bond by one who desires to deal in foreign game, and

this provision is, as we think, the provision contemplated by the amendatory words. As we read the amended section, it was the purpose of the Legislature to forbid the sale of foreign grouse and woodcock unless the person selling them or offering them for sale had given the bond for which provision was made by the later words of the section. This reading is certainly within the intention, and, as we think, within the words of the statute.

If construed as the appellant contends it should be, the amendment would be useless and meaningless. It might, of course, happen that the Legislature, in attempting to amend the statute, would by use of inapt words really effect no change in the meaning of the statute, but upon the plainest principles we are not to give such a construction to an amendment, if the language used is open to a construction consonant with the evident purpose of the amendment.

The amendment under consideration is open to a construction which will effectuate its purpose, and we cannot, therefore, give it a construction which will defeat that purpose.

The judgment should be affirmed, with costs.

PATTERSON, P. J., McLAUGHLIN, LAUGHLIN and HOUGHTON, JJ., concurred.

Judgment affirmed, with costs. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. HORACE E. STILLMAN and AUGUSTUS C. LOCKWOOD, Respondents.

First Department, January 25, 1907.

Game Law — sale of foreign grouse — erroneous nonsuit.

In an action to recover the penalty for selling grouse or partridge without giving a bond, as prescribed by section 27 of the Forest, Fish and Game Law, it is immaterial whether the birds were killed in this State or in a foreign State, if the defendant has not filed a bond.

When the defendants contend upon conflicting facts that they merely delivered the grouse as agents of foreign owners, the question whether they acted in that capacity only or actually sold individually or as agents is for the jury, not for the court, and a nonsuit is error.

Although the defendants act as agent for a non-resident in making such sales, they are not relieved from liability.

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APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 9th day of June, 1906, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 20th day of August, 1906, denying the defendants' motion for a new trial made upon the minutes.

Robert C. Beatty and *Selah B. Strong*, for the appellant.

Francis A. Winslow, for the respondents.

HOUGHTON, J. :

The action is to recover from the defendants penalties for selling grouse or partridges without having given the bond prescribed by section 27 of the Forest, Fish and Game Law (Laws of 1900, chap. 20, added by Laws of 1903, chap. 291 and amd. by Laws of 1904, chap. 580 and Laws of 1905, chap. 335).

The defendants are engaged principally in the wholesale fish business. One of their salesmen received a box alleged to contain seventeen partridges, which is claimed to have come from the State of Rhode Island, and which was delivered at defendants' place of business. Immediately thereafter the box with its contents was delivered to a firm of poultry and game dealers, and a sales slip reading "8½ pr Pats 2.25 per 19.12" was made out, and on presentation by defendants the money was paid to them.

From the record it is apparent that there was no serious controversy on the trial that the box contained partridges. In any event the plaintiff made *prima facie* proof that such was the fact, and it was immaterial whether the birds were killed in this State or in a foreign one. (*People v. Weinstock*, 117 App. Div. 168, decided herewith.)

The real issue litigated was whether the defendants were guilty of selling, individually or as agents, within the meaning of the statute. This question under the proofs was one for the jury to pass upon, and not for the court. The defendants' contention is that they did not sell the partridges, but that they merely acted as delivery and collecting agents for a brother-in-law of one of the

defendants, who lived in Rhode Island and dealt in game birds. Whether, if this was all they did, it would be a justification to them or not, we do not feel called upon at this time to determine. On a retrial, which we conclude must be ordered, the jury may find that there was an actual sale by the defendants either as individuals or as agents for another, and this question thus be eliminated.

Of course, the fact that the defendants might have acted as agents for another, who was a non-resident, in making the sale could not relieve them from liability as selling agents. If it could the statute would become practically inoperative, for sales would always be conducted in this manner. Even if the mere acting as delivery and collecting agent for a foreign seller does not render a person liable under the statute, which question we do not decide, still it is manifest that acting or claiming to act in that capacity cannot be used as a shield against the statute or as a mere subterfuge to evade its penalties.

There being a question for the jury to determine the nonsuit was error, and a new trial must be granted.

The judgment is reversed and a new trial granted, with costs to the appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and LAMBERT, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

E. P. DUTTON & COMPANY, Appellant, v. VICTOR W. CUPPLES and ARTHUR T. LEON, Doing Business under the Firm Name and Style of CUPPLES & LEON, Respondents.

First Department, January 25, 1907.

Injunction to restrain unfair business competition — facsimile reproduction of books published by plaintiff — injunction granted — practice — when denial of preliminary injunction reviewed on appeal.

When in an action for a permanent injunction a preliminary injunction has been denied in the court below, the Appellate Division will usually leave the question of the right to an injunction to be determined on the trial. But where it is apparent that no facts substantially different will be developed on the trial,

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and there is little or no dispute as to any material fact, but merely as to the conclusions to be drawn therefrom, the Appellate Division will determine the right to a preliminary injunction on appeal from the order denying it.

It appeared that for several years the plaintiff had published a set of holiday books of great artistic merit, though neither the matter nor the design was copyrighted. The defendants copied the set of books as near as possible by photographic processes, and though the work was inferior, the two productions were so nearly alike as to be calculated to deceive the public. In an action for an injunction, based upon unfair business competition,

Held, an injunction should be granted, as the defendants were unfairly and fraudulently attempting to trade upon the reputation which the plaintiff had built up for its books;

That, as the similarity of the products was so evident, it was unnecessary for the plaintiff to show that the defendants had a fraudulent intent or that any persons were actually deceived by the imitation.

(INGRAHAM, J.): The fact that the defendants are reproducing the plaintiff's books by a cheap and inferior process and are able to sell them at a lower price, is no reason for refusing the injunction, but is, on the contrary, a reason for granting it.

APPEAL by the plaintiff, E. P. Dutton & Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of December, 1906, denying the plaintiff's motion for a temporary injunction.

Arthur L. Marvin, for the appellant.

William A. Megrath, for the respondents.

SCOTT, J. :

The plaintiff seeks an injunction to restrain defendants from publishing, selling or offering for sale certain books, designated the "Eureka Series." Both plaintiff and defendants are booksellers and publishers, and plaintiff bases its demand for an injunction upon the claim that the defendants have been guilty of unfair competition or unfair trade in putting upon the market a series of books so similar in appearance and make-up to a set of books which plaintiff has published and sold for a number of years as to indicate a conscious and probably successful effort to deceive the public into buying defendants' publications, believing them to be those published by plaintiff, and thereby the plaintiff will be injured in its business, and purchasers will be also injured, because defendants' books, although

an obvious copy of plaintiff's, are concededly of less artistic and substantial value. The plaintiff has no copyright and claims nothing on that score. The affidavits read on both sides are voluminous, but the most convincing proofs are the books themselves of which copies were produced on the argument and are now before us.

In ordinary cases, where a preliminary injunction has been denied in the court below we are slow to interfere with the action of that court, preferring to leave the question for the trial of the cause. In the present case, however, it is quite apparent that no substantially different state of facts will be developed upon the trial from that which is presented on this appeal, for it may safely be said that there is little or no dispute as to any material fact, the difference between the parties resulting from the different deductions and conclusions which they respectively draw from the facts, and as has already been said, the crucial, decisive evidence consists of the books themselves. Under such circumstances it has been the practice of his court to determine, upon appeal from the order, the propriety of issuing or refusing to issue a preliminary injunction. (*McLoughlin v. Singer*, 33 App. Div. 185, 189.)

About the year 1900 the plaintiff formed the project of publishing a set of books especially adapted for sale during the Christmas holiday season, and in the year 1901 did publish and place upon the market a number of such books. The books were small and in each was printed a single (or in some cases more than one) short poem or hymn which had attained general fame and popularity in the public estimation. The books were profusely illustrated with illuminated capitals, and type adapted from that used in ancient missals, as well as by pictures in colors, some being originally prepared by plaintiff's artists and some being copies of well-known paintings. Each copy was bound in an attractive and highly decorated leatherette cover, one-half white and one-half in color with illustrated sides, and with a large picture in color, appropriate to the sentiment conveyed by the particular hymn or poem contained in the book. The books were possessed of considerable artistic merit, and the workmanship as to type, coloring, illustrating and binding was of a high order. Much success attended the publication of these books, so that plaintiff in succeeding years not only reprinted the books first published, but added many books, in the

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same general style to the series, and had large sales and reaped substantial profit. In the year 1906 the defendants published and placed upon the market the series of books the publication and sale of which is now sought to be restrained. It appears from the affidavit of an expert, and, indeed, is quite apparent to the lay eye, that the defendants have by some photographic or photo-lithographic process copied the printing, illuminations, borders and pictures contained in plaintiff's books, have encased them in a similarly colored binding upon which has been copied the illustrations and letterings found upon plaintiff's books. In short, they have reproduced plaintiff's books as faithfully and exactly as could be done by photography. The work has been much less artistically and expensively done, although, so far as possible, without too great expense, the colors used by plaintiff have been reproduced or imitated. The result has been that defendants have published cheap and inartistic copies of plaintiff's books, which have been offered for sale at a much smaller price.

Placed side by side, no one could fail to appreciate the difference between the publications, and yet could not fail to be struck by the careful attempt to produce an imitation. Seen apart from each other, so that they could not be compared, nothing would be easier than for an incautious buyer to be deceived by the resemblance and to purchase one of defendants' books, believing that he was purchasing plaintiff's.

The injury likely to be done plaintiff is twofold. *First*, it is threatened with a loss of sales and consequent profit; and, *secondly*, it is threatened with a loss of reputation as a producer of fine and artistic books.

As has been said, the plaintiff claims no protection from the copyright laws, and, indeed, few, if any, of the poems and hymns printed in the series could have been copyrighted. It does not claim that the idea of publishing a single hymn or poem in a separate volume, with illustrations, is original with it, nor does it claim originality for the idea of a decorated border for each page, the half-white binding with decorations and pictures, or the combination in one book of a number of short songs or poems relating to one general subject. It does claim, however, and its contention is not disputed, that the particular designs of the covers of its books, the

particular borders to the pages and the particular illustrations were original with it. It, therefore, insists that each book, considered as a whole, distinct from its various parts, to wit, a combination of binding, of type, of illuminated capitals, of illustrations, of borders, is something which belongs solely and exclusively to plaintiff, and that it has a distinct property right therein. The plaintiff cannot, and does not, question defendants' right to publish any one, or all, of the same hymns and poems; to publish them in half-white binding with decorated and pictured binding; to adopt any form of type it pleases; to illustrate the books and to decorate the borders of its pages, but it is contended, and as we think with reason, that it is violative of the rule of fair trading and fair competition, as established and enforced by law, to exhibit and offer for sale such identical copies (save in artistic merit and workmanship) of the books which plaintiff had published, and for which it had created a profitable demand. The obvious purpose of publishing such copies was to trade upon the favorable reputation which plaintiff had established for its books; to deceive many purchasers into the belief that they were purchasing plaintiff's books, and to damage plaintiff by the unfair use of its ingenuity in devising the general make-up of its books and of its success in placing the books upon the market.

In such a case it was unnecessary for plaintiff to prove, *dehors* the books themselves, that defendants were inspired by a fraudulent intent. (*Day v. Webster*, 23 App. Div. 601; *Dunn Co. v. Trix Mfg. Co.*, 50 id. 75.) Nor, in so flagrant a case as the present, is it necessary to prove that any person was actually deceived by the imitation. It is apparent that there was every probability of such deception, and that is precisely what the law seeks to prevent. (*Vulcan v. Myers*, 139 N. Y. 364.) Upon the general right of the plaintiff to protective relief we cannot see any reason why the same rule should not be applied to a book that has been applied to a game, or to cigars, or to anything else which is distinguished by a label, or by the distinctive form or style of the package. The decisive fact is that the defendants are unfairly and fraudulently attempting to trade upon the reputation which plaintiff has built up for its books. The right to injunctive relief in such a case is too firmly established to require the citation of authorities.

The order appealed from should be reversed, with ten dollars

costs and disbursements, and the motion granted, with ten dollars costs, upon plaintiff giving the usual undertaking in the sum of \$1,000.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

INGRAHAM, J. (concurring):

I concur fully in Mr. Justice SCOTT's opinion. If these defendants had put up any ordinary merchandise in a package which exactly reproduced the plaintiff's package and labels and offered it for sale, there would be no question but that it would be unfair competition which a court of equity would enjoin. The plaintiff has established an important business, manufacturing and selling certain literary and artistic productions which it is conceded they have no exclusive right to manufacture and sell. The name of the publisher of a book of this kind is unimportant; it is the general artistic appearance of the book itself that attracts the purchaser, and I can see no reason why the defendants should be allowed to reproduce a book manufactured and sold by the plaintiff, in all its details and peculiarities, so that it requires a comparison of the two articles to distinguish them, than any other article of merchandise. It is, however, said that because the defendants can exactly reproduce the plaintiff's books by a cheap and inferior process and are, therefore, able to sell them at a much lower price than that at which the plaintiff is able to sell the books it produces, the court should not interfere. But it seems to me that this is the very reason why a court of equity interferes — to prevent a fraudulent and unfair competition by one manufacturer appropriating the skill and labor of another manufacturer in designing and manufacturing merchandise, so that one can reproduce the articles better designed and manufactured, and by avoiding the expense involved in the designing and preparation of the article, undersell his competitor.

That these defendants manufactured the books that they offered for sale is not disputed; that they exactly reproduced the plaintiff's books is not disputed; and an inspection of the two books establishes that the ordinary purchaser, influenced only by the general effect and not by a comparison of the books themselves, would not detect the difference. Why should the defendants be allowed to

appropriate the benefits of the experience, business sagacity, artistic ability and of the money that the plaintiff has invested in these books by manufacturing an exact reproduction, avoiding the expense incurred by the plaintiff in designing and producing the books; and put them on the market under such circumstances as will deceive the casual purchaser and at a price which would be a strong inducement to purchase the defendants' rather than the plaintiff's productions? The defendants have the right to design these books; to combine the illustrations and the text, and to bind their books in such style and manner as they desire; but I do not think that they have the right to exactly reproduce the type, illustrations, binding and design of the plaintiff's books, although greatly inferior in artistic value, and sell them at a much lower price than the plaintiff can sell its books for. I can see no reason why the same general rule which has been adopted and enforced as to general merchandise should not apply to books or any other article manufactured by one merchant for general sale and distribution, and it seems to me that, upon the defendants' own statement, a case is made out which justifies the interposition of a court of equity.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, upon plaintiff giving the undertaking mentioned in opinion.

In the Matter of the Judicial Settlement of the Account of Proceedings of the UNITED STATES TRUST COMPANY OF NEW YORK, as Executor, etc., of ALONZO W. BALCH, Deceased.

ADELAIDE M. BALCH, as Executrix, etc., of DAVID C. BALCH, Deceased, Appellant; EVA ROHR and Others, Respondents.

First Department, January 25, 1907.

Trust — savings bank — deposit in trust for another — when trust tentative — when widow of beneficiary not entitled to deposit — evidence — transactions with deceased depositor inadmissible.

A deposit by one person of his own money in his own name in trust for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration,

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such as delivery of the passbook or notice to the beneficiary. If the depositor die before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor. But until the depositor's death the funds are impressed with no trust in the sense that any title thereto, actual or beneficial, vests in the proposed beneficiary unless the depositor shall have completed the gift as aforesaid, and the trust remains inchoate and incomplete.

When it appears that one deposited money in his own name in a savings bank in trust for his son and the son died before the depositor, the tentative trust was never consummated so as to vest the son during his lifetime with any title or interest in the moneys, and hence the widow of the son is not entitled to the deposit on the death of the depositor. On the death of the son before the depositor, the trust terminated *ipso facto* and no action on the part of the depositor was necessary to end it.

In an action by the widow of the former beneficiary against the estate of the depositor evidence that she or her husband knew of the deposit is inadmissible, being immaterial unless the fact had been communicated by the depositor, and she being incompetent to testify to personal transactions with the deceased.

Nor is evidence admissible to show that the depositor's wife contributed some of the money deposited.

INGRAHAM, J., dissented, with opinion.

APPEAL by Adelaide M. Balch, as executrix, etc., from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 31st day of May, 1906, confirming the report of a referee against the appellant on her claim to funds represented by two certain savings bank books.

John D. Fearhake, for the appellant.

Evan Shelby, Maunsell B. Field and *Peter S. Carter*, for the respondents.

SCOTT, J. :

Alonzo Balch, the testator, on March 15, 1873, opened two savings bank deposits in different banks, and to the credit of each account deposited \$250. Each account was opened in the name of "Alonzo W. Balch in trust for David C. Balch," the latter being the son of Alonzo. But a single amount was drawn from each account in 1876, and additional sums were paid in to each account at various times. On February 13, 1902, David C. Balch, the son, died, leaving a widow, Adelaide M. Balch, his sole legatee and executrix. The father, depositor of the funds, died on December 21, 1903, having made no withdrawals from or deposits to the

credit of either account since his son's death, or for a long time prior thereto.

There is evidence that the attention of Alonzo Balch was called to the bank books after his son's death, and shortly before he himself died, but he did not act in relation thereto.

The appellant, as executrix of David C. Balch, deceased, claims to be entitled to receive the sums now on deposit in the savings banks to the credit of the aforesaid accounts. As pointed out by the Court of Appeals in a recent case (*Matter of Totten*, 179 N. Y. 112), the law respecting so-called "savings bank trusts" is of recent growth, and for some time there was no little doubt as to their true status and character. The Court of Appeals, in the case just cited, has established a rule respecting them, which is stated to have been arrived at after much reflection, as follows: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." As this rule was formulated with great care, we are to assume that the words in which it is couched were advisedly chosen. It will be seen upon a careful reading that the trust is, in the first place, described as a "tentative trust," by which we understand a suggested or proposed trust, not completed or consummated. It will also be noted that the subject of the trust, when it finally becomes consummate, is the balance on hand at the death of the depositor. It would seem to follow that until the depositor's death the funds on deposit are impressed with no trust in the sense that any title thereto, actual or beneficial, vests in the proposed beneficiary unless the depositor shall have completed the gift in the manner suggested by the case above cited. As to him the tentative trust remains inchoate and incomplete. The appellant, as executrix of David C. Balch, can have no right to the moneys on deposit, unless her testator had, at the moment of his death, some property

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right in or title to the money then on deposit to the credit of the accounts. That he had acquired no such right or title as a gift *inter vivos*, is settled by authority. (*Beaver v. Beaver*, 117 N. Y. 421.) There seems to be like authority for the proposition that David C. Balch had no such present right or title, at the time of his death, as the proposed beneficiary of a trust. (*Cunningham v. Davenport*, 147 N. Y. 43.) In the latter case one John Cunningham had opened a savings bank account in the name of "John Cunningham, in trust for Patrick Cunningham, his brother." Patrick died before the depositor, and three days later John caused the account to be changed to his own name, and afterward drew out all the money. Patrick Cunningham's administrator claimed to be entitled to the moneys on deposit at the time of his decedent's death. This claim was disallowed by the Court of Appeals.

While not so stated in words by that court, it must have been considered that Patrick Cunningham, at the time of his death, had no interest in or title to the fund which passed to his legal representative. Otherwise, the latter's claim would have been impregnable. Furthermore, the tentative trust indicated by the manner of the deposit was proposed only for David C. Balch, the depositor's son, who was a young lad when the deposits were first made. There is nothing whatever to indicate that the father intended that, in any event, any person other than his son should become the beneficiary of the accounts. We are of the opinion that the tentative trust suggested by the form in which the savings bank accounts were opened never became consummated so as to vest in David C. Balch, in his lifetime, any present title or interest in the moneys deposited to the credit of the accounts; that upon the death of the sole proposed beneficiary before the depositor the tentative trust terminated *ipso facto*, and that the funds on deposit thereafter remained the sole property of the depositor unimpressed by any trust, tentative or consummate, and that no action was necessary on the part of the depositor to terminate the trust. Consequently, nothing passed to David C. Balch's executrix, and she can establish no claim to the moneys in question. We find no error in the exclusion of evidence offered by the executrix. That she or her husband knew of the fact of the deposit would be wholly immaterial, unless that fact had been communicated by Alonzo Balch, the depositor, and she cer-

tainly was incompetent to prove any personal transaction with him. Nor would it be significant or material to show that the husband's mother contributed some of the money which Alonzo Balch deposited.

The order appealed from should be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN and CLARKE, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

The testator on March 15, 1873, opened two savings bank accounts, one in the Bowery Savings Bank, and the other in the Seamen's Bank for Savings. In each of those accounts he deposited \$250. In the Bowery Savings Bank the account was opened, "Bowery Savings Bank, in account with Alonzo W. Balch in trust for David C. Balch, his son." In the Seamen's Bank for Savings it was, "Seamen's Bank for Savings in account with Alonzo W. Balch, in trust for David C. Balch." From the account in the Bowery Bank there was drawn out \$33.10 on February ninth, the year not stated. The interest was credited in this bank book in 1874, 1876, 1879, 1881, 1891; and on March 3, 1891, \$100 was deposited and the account remained in this condition until the death of the testator. In the Seamen's Bank for Savings there was withdrawn on July 2, 1876, \$71.88. The interest was credited on this account from January, 1874. On March 3, 1874, \$200 in addition was deposited, and the bank book was balanced on January 1, 1879, showing a balance of \$526.90. On February 28, 1891, \$200 in addition was deposited and the account continued without further change to the death of the testator. At the time these accounts were opened the testator had a son, David C. Balch, six years of age. This son died on February 13, 1902, leaving a last will and testament making his wife, Adelaide M. Balch, sole legatee, and appointing her executrix, which was admitted to probate and letters testamentary issued. The testator died on December 21, 1903, leaving a last will and testament which was admitted to probate and letters testamentary were issued to the United States Trust Company as executor. The question presented is, whether the appellant, as executrix of David C. Balch, is entitled to the amount of these two deposits. There is evidence that the testator's attention was

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called to these two bank books shortly before his death, and after the death of the beneficiary, but the testator did no act which indicated an intention to revoke the trust. By this deposit with the savings bank in trust for the depositor's son there was created a trust; the depositor became the trustee, and the son the beneficiary. The accounts were not active accounts; they were not used by the testator for his personal deposits; there was but one withdrawal from each of the accounts, and but three additional deposits during the thirty years that they were in existence before the death of the testator. In the absence of any communication of the existence of the trust to the beneficiary, or any other act of the creator of the trust to indicate an intention to make the trust irrevocable, these trusts were revocable by the testator at any time prior to his death. (*Matter of Totten*, 179 N. Y. 112.) If the testator had died before the beneficiary, without revoking the trust, there could be no question but that the beneficiary would have been entitled to the amount deposited. The court below held that this trust was revoked by the death of the beneficiary prior to the depositor's death. The whole question is discussed and the various decisions in this State upon this subject considered in *Matter of Totten (supra)*. It is there said: "When a deposit is made in trust and the depositor dies intestate, leaving it undisturbed, in the absence of other evidence, the presumption seems to arise that a trust was intended in order to avoid the trouble of making a will. * * * After much reflection upon the subject, guided by the principles established by our former decisions, we announce the following as our conclusion: A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

This decision settles the disputed question in relation to these savings bank deposits, except in case of the death of the beneficiary

before the depositor. The trust being revocable by the depositor, any act indicating an intention of the depositor to revoke it would be sufficient, but it is revocable by the creator of the trust, and if he allows the trust to continue after the death of the beneficiary, it would seem to indicate that he intended it should continue, and upon his death become absolute. The trust, which is revocable by the trustee or creator of the trust, continues as a valid trust until by some act of the creator of the trust, who reserves the right to revoke it, the trust was revoked. It was not revocable by the act of any person except the creator of the trust, and it was to remain a valid trust if unrevoked at his death. The death of a beneficiary does not revoke a trust of which he is the beneficiary, and if a trust was created by the deposit, in the absence of any act of the testator indicating an intention to revoke, the trust continues, and after the death of the creator of the trust, the beneficiary, or his personal representatives, is entitled to the trust fund. In *Matter of Bulwinkle* (107 App. Div. 331) the creator of the trust, after the death of the beneficiary, erased the name of the beneficiary from the bank book and treated the account as a personal account, depositing and withdrawing moneys, and this justified the conclusion that the creator of the trust revoked it before her death. In *Garvey v. Clifford* (114 App. Div. 193; 99 N. Y. Supp. 555) it was held under the facts then disclosed that no trust was created. It is said that this trust is tentative, dependent upon the survival of the beneficiary, but there is no evidence to show that such was the intention of the depositor. He undoubtedly reserved the right to revoke it and to that extent it was tentative, but his failure to revoke it after the death of the beneficiary of which he had knowledge indicated an intention to continue it.

I am also inclined to think that it was error to exclude the testimony of the executrix of the son. The executrix was called and asked as to communications made to her by the beneficiary to show that he had knowledge of the existence of the trust during his life. The fact that the beneficiary had notice of the existence of the trust in his favor was a fact which was competent evidence, and that fact could be proved by declarations by the beneficiary indicating that he had such knowledge. The testimony of Adelaide M. Balch was offered in behalf of the estate of which she was the executrix. She

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was not an adverse party to the estate of which she was executrix, and if it was competent to prove that her husband had notice of the existence of this trust, the fact that her husband was dead and she was interested in his estate would not make her testimony invalid under section 829 of the Code. The evidence was not offered to prove personal transactions with the creator of the trust against whose estate a claim was made, but a declaration made by the beneficiary to show that he had knowledge of the existence of the trust.

I think, therefore, that this order should be reversed.

Order affirmed, with costs.

HARRIS B. GOLDMAN, Respondent, v. FRANK G. SWARTWOUT,
Appellant.

First Department, January 25, 1907.

Trial — tender by defendant with payment into court — when judgment for amount of tender with costs not authorized — appeal — reversal after submission of case on erroneous theory.

When before action brought to recover the value of stock alleged to have been intrusted to defendant for sale, the defendant tenders the proceeds of the sale and on the refusal of the tender deposits the sum in court, the defendant is entitled to a verdict if the plaintiff fails to establish a right to more than the sum tendered.

When the plaintiff fails to recover more than the tender, he is not entitled to costs. Under such circumstances the defendant is entitled to prove the tender and deposit as a defense of payment, and when the court rejects such evidence and charges that the jury is to render a verdict for the amount of the tender if that be found to be the amount the defendant received for the stock, or a verdict for a larger amount if a larger amount were received, the case is submitted upon an erroneous theory, and a verdict for the amount of the tender with costs will be reversed, although the defendant took no exception to the charge. The error is available under an exception to the denial of a motion for a new trial on the ground that the verdict was contrary to law.

APPEAL by the defendant, Frank G. Swartwout, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of April, 1906, upon the verdict of a jury, and also from an order

entered in said clerk's office on the 27th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

James C. Bushby, for the appellant.

Nathan D. Stern, for the respondent.

LAMBERT, J. :

The defendant in this action appears to have been intrusted with certain shares of the stock of the Scarsdale Water Company, with authority to sell the same for the plaintiff and his wife, at a price not less than fifty dollars per share. The cause of action originally pleaded involved eight shares, but it subsequently appearing that seven of these shares belonged to the plaintiff's wife, the action was continued only as to the single share owned by the plaintiff. The defendant sold this share of stock, with others, and the plaintiff brings this action to recover one hundred dollars, the par value of the stock. The defendant claimed to have sold the stock for fifty dollars, the minimum figure authorized, and it is not disputed that he tendered to the plaintiff fifty-one dollars in cash, this being the purchase price with interest added, the defendant having been prevented by an injunction from paying over the same. This tender was refused. These facts were set out in the answer, and it was alleged that this amount had been paid into court, and remained there subject to the plaintiff's acceptance. Upon the trial the defendant offered evidence tending to prove the payment of the fifty-one dollars into court, but on the plaintiff objecting that such evidence was "incompetent, irrelevant and immaterial," the court, without ruling otherwise, said: "It is not necessary. All this jury will have to pass upon is the amount the stock sold for." In its charge the court submitted this single question, whether the defendant sold the stock for fifty dollars, as he claimed, or whether he had received seventy-five dollars, as the plaintiff alleged the defendant had stated to him, and the court said: "If it is \$75 then you are to render a verdict for \$89.40, being the amount with interest; but if it was \$50, then because of the tender made in this case, which stops the running of interest, you are to render a verdict for \$50."

The defendant's counsel moved for a new trial, on the grounds that the verdict "is contrary to the evidence, contrary to the weight

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of evidence and contrary to law," without making any objection or exception to the charge of the court in submitting the question. The result is that the defendant, who has, under the verdict, discharged all of the duties and obligations which he owes to the plaintiff, is confronted with a judgment for costs in the sum of \$137.82, a manifest injustice, which it is the duty of this court to prevent.

This is not the case of a tender after the bringing of the action, as provided for by sections 731 to 734 inclusive of the Code of Civil Procedure; it is a common-law tender. The defendant, before any action was brought, tendered the plaintiff the amount which he had received for the stock, together with interest, and this tender was rejected. These facts were pleaded and sought to be proved upon the trial; and the answer further alleged that the money had been paid into court. When the defendant offered evidence in support of this proposition, the plaintiff raised objections to the proof. The court suggested that it was unnecessary, evidently intending to take judicial notice of the fact of the deposit, as he did in his charge to the jury; and for this he had some warrant. (17 Am. & Eng. Ency. of Law [2d ed.], 926; 16 Cyc. 916.)

Under this situation of affairs the defendant was entitled to the benefit of his defense of a tender in liquidation or payment of the debt in suit. In contemplation of law the defendant had relinquished all claim to the fifty-one dollars; that belonged of right to the plaintiff. It had been offered to him, and the offer had been kept good by the defendant surrendering the fund to the court in behalf of the plaintiff; and as the latter failed to establish a right to more than the sum which the defendant conceded to be due the defendant was entitled to a verdict. Under the circumstances of this case he had a right to assume that the verdict of the jury sustaining his contention would be in his favor; and his failure to take exception to the direction of the court to find a verdict for fifty dollars, if they found with the defendant's contention, ought not to be permitted to deprive him of his rights. The plaintiff acquiesced in the charge, which assumed the deposit; and the injustice to the defendant is due merely to the error of the court in excluding all consideration of the tender. The defendant had paid to the plaintiff, in contemplation of law, all that was due him. (*Becker v. Boon*, 61 N. Y. 317, 322; *Wilson v. Doran*, 110 id. 101, 106, 107, and

authorities there cited.) If the money was in the hands of the court (and this was assumed by the court and acquiesced in by the plaintiff), it belonged to the plaintiff, and the defendant could not take it away from him, no matter what the result of the trial. The defendant, therefore, owed to the plaintiff nothing, and yet by the judgment entered upon the verdict he is charged with costs far in excess of the amount claimed; he is punished, while having discharged every duty which he owed to the plaintiff.

The verdict is, in form, contrary to law, and the judgment based upon that verdict cannot stand without working such a wrong that it would be a shock to our sense of justice. The case was submitted to the jury upon an erroneous theory, and in such a case we are not limited by the fact that the defendant failed to take an exception to the charge (*Leach v. Williams*, 12 App. Div. 173, 175; *Vorce v. Oppenheim*, 37 id. 69); it is enough that he moved for a new trial upon the ground that the verdict was contrary to law, and excepted to the denial of that motion.

The judgment and order appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

ANDREW W. McCANN, Respondent, v. INTERURBAN STREET RAILWAY COMPANY, Appellant.

First Department, January 25, 1907.

Negligence — injury to motorman by "plow" of car catching in slot rail.

A recovery for an injury to a motorman from the sudden stopping of his car cannot be sustained on the theory that the accident was caused by the negligence of the defendant in failing to furnish safe appliances where the car was stopped by the "plow," which connected the car with the underground cable, catching in the slot rail, due to the fact that the rail had closed up so that the slot for a short distance was but one-half inch in width instead of the usual three-quarters. The defendant cannot be charged with negligence in failing to anticipate that such an accident might occur, even if it had notice of the defect in the rail.

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APPEAL by the defendant, the Interurban Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of March, 1906, upon the verdict of a jury for \$2,500, and also from an order entered in said clerk's office on the 2d day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

John V. Bouvier, Jr., for the appellant.

Oscar A. Campbell, for the respondent.

LAMBERT, J. :

The plaintiff was injured in an accident upon the defendant's car on the 15th day of December, 1902. He was employed as a motor-man, and on the day in question was sent out on a light four-wheeled car. The car had been newly equipped with a plow, a device which passes through the slot rail in the center of the defendant's tracks, transmitting the electric current from the cable below to the motor on the car. No defect is suggested in this plow; it is stated only that it is thicker at the point where it passes through the slot rail than an old one. The accident occurred at or near the intersection of North Moore street and West Broadway, in the borough of Manhattan, and the negligence alleged is a failure on the part of the defendant to provide suitable, sufficient and safe appliances, place to work, roadbed and connections thereto, and track, and that the defendant had notice of these defects.

The plaintiff's story (and he does not call the conductor of the car or any other person who is alleged to have seen the accident) is to the effect that on the morning of the day mentioned, at sixty, he was approaching the street intersection, running down grade with the current shut off; that he saw a fire marker, and that under the rules of the company it was his duty to bring his car to a full stop; that he was applying his brake, and had his weight upon his right arm, and that while endeavoring to bring his car to a standstill, the car stopped suddenly, throwing him against the gate, resulting in the injuries for which he is seeking to recover. He made no examination of his car or of the track at the time of the

accident. He says he stood there with his car for a little time, and then went on his way, running the car until about four o'clock in the afternoon; that on his second trip back, at about nine-thirty, he got off his car at the point of the accident to find out the cause, and discovered that the slot rail had closed up to such an extent that for a distance of two feet and a half the opening was only about half an inch, whereas at other points it was about three-quarters of an inch. These measurements do not appear to be very accurate. He says that at the narrow place he could only pass one finger through the slot, while at the other points he could insert two fingers, but he does not say how much room there was outside of the single finger, or how tightly the two fingers were pressed. He says that the plow was about half an inch in thickness where it passed through the slot, and that if this had been a heavy car it would have passed through without a jar; and while he must have started his car from a standstill, on resuming his journey, he makes no mention of experiencing any difficulty in starting the car or in operating it over this same place during the day. According to his own estimates, the space was about half an inch wide, and the plow was likewise half an inch wide, and there is the intimation that there would have been no difficulty except that the defendant had equipped the car with a new plow. The plaintiff's own testimony indicates clearly that he had no intimation of the cause of the trouble at the time of the accident, and he did not then look to the condition of the tracks or the groove rail, but when passing along on his second trip at nine-thirty he got off the car and found this alleged defect, which, he testified, over the defendant's objection and exception, was in the same condition as at the time of the accident, although he was shown not to have known anything about its condition at that time.

Where is the actionable negligence? What man of ordinary prudence and care, looking upon this alleged defect, would anticipate the accident, or one of a similar character? Actionable negligence is not predicated upon what we might see could have been done to prevent the accident, after the accident had happened, but upon the degree of care which ordinarily prudent men, looking at the situation before the accident had happened, would say was likely, in the exercise of ordinary care, to occur. And, in the light

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of this evidence, what man of ordinary care, knowing the equipment of these cars, and looking at this alleged defect, would anticipate that it would result in causing a sudden stopping of a car and producing injury? The plaintiff had had twenty-five years' experience in running cars, and several years as a motorman; but it does not appear to have suggested itself to his mind that the slot rails were out of order until several hours after the accident, and then he was obliged to leave his car to discover the defect; and the defect, if it in fact existed, was so slight that the plaintiff tells us it would not have jarred a heavy car, while his own car appears to have been operated through the same place all during the day, and to have been started without difficulty (for none is suggested) from the very point where it came to a sudden standstill. Assuming, as we may, in the light of the verdict of the jury, that this accident resulted from the closing up of the slot, the facts do not justify the conclusion of negligence on the part of the defendant. If the slot had been one-sixteenth of an inch wider than it was, or if the plow which was in use had been worn slightly, an accident such as is described could not have happened, and to say that the defendant owed a degree of care which should have discovered and remedied so slight a defect — that it should, in the exercise of reasonable care, have anticipated that the defect would result in this or a similar accident — is carrying the doctrine of negligence to the point of absurdity.

It is true, of course, that there was some very loose testimony on the part of an ex-employee, to the effect that he had, while employed as a starter, with some duty to report defects, been told by an inspector some days before the accident, and again on the morning of the accident, that there was a defect in the slot rail in the vicinity where this accident occurred. But the person who is alleged to have made this report was not produced, nor was the point definitely fixed, and at most it could only go to the question of notice. As we have seen, if the situation had been called to the attention of the defendant, there was nothing from which reasonable minded men would have been led to believe that the accident described in the testimony would result. Indeed, if the plaintiff himself, with all his experience, had seen the slot, as it may be assumed to have been at the moment of the accident, is it probable he would

have anticipated that it would impede the running of the car and cause it to stop suddenly? He knew, in a general way, that the plow required about half an inch of space; he would have seen that the slot was about half an inch wide, and knowing that cars had operated over it the day before, he would scarcely feel that the company was negligent in not opening the slot to the full width, as it was found in other places. And if the plaintiff would not regard it as negligent before the happening of the accident, he is in no better position after the accident has happened. It is reasonable care which the law demands as between the master and servant; and because there is no evidence in this case to show that the defendant had failed to exercise that reasonable care in its equipment, construction and maintenance, there was no question for the jury, and it was error to permit them to speculate upon the question.

The judgment and order appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

INGRAHAM and McLAUGHLIN, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., concurred in result.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HUGH F. MAGUIRE,
Relator, v. THEODORE A. BINGHAM, as Police Commissioner of
the City of New York, Respondent.

First Department, January 25, 1907.

**Municipal corporations — certiorari to review dismissal of police officer
— evidence insufficient to show misconduct of officer.**

When on certiorari to review the dismissal of a police officer in the city of New York for conduct unbecoming an officer, it appears that the relator was discharged for accepting money in violation of rule 22 of the Police Manual, and the only evidence in support of the charge was the fact that a witness whose son had been arrested by the relator had threatened to get even with him, and had under an agreement with the police inspector thrust money into the relator's hand while the latter was on duty and immediately ran away and boarded a car, the dismissal is not warranted by the evidence and the relator is entitled to reinstatement.

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CERTIORARI issued out of the Supreme Court and attested on the 4th day of January, 1906, directed to Theodore A. Bingham, as commissioner of police of the police department of the city of New York, directing him to certify and return to the office of the clerk of the county of New York all and singular the proceedings had by his predecessor, William McAdoo, in relation to the removal of the relator from the police force of said city.

Jacob Rouss, for the relator.

Theodore Connolly, for the respondent.

LAMBERT, J. :

The relator was charged with conduct unbecoming an officer, the specifications being as follows :

"*First.* Said Patrolman Hugh F. Maguire, of the twenty-fifth Precinct, did, at about 9.30 A. M., September 23, 1905, at the northwest corner of East Eleventh Street and Third Avenue, wilfully and wrongfully advise one Maurice McMahon, of 206 East One hundred and twenty-sixth street, to pledge a watch which the said McMahon's son, Maurice McMahon, Jr., had found in the public street, and to give Patrolman David Isenberg, of the Twenty-fifth Precinct, five dollars from the amount borrowed on said watch.

"*Second.* Said Patrolman Hugh F. Maguire, by arrangement with one Maurice McMahon, of 206 East One hundred and twenty-sixth street, met the said McMahon at the southeast corner of Seventy-first street and First Avenue at about 8.20 P. M., September 23, 1905, and did then and there accept a five dollar bill from the said Maurice McMahon in violation of Rule 22 of the Police Manual."

Beyond the fact that Maurice McMahon, Jr., did find a watch and a sum of money in the public street, there is not a particle of evidence in support of the first specification, and the dismissal cannot stand upon such specification. It is needless to say that where an officer is entitled to a trial as a condition of removal, it is necessary that there shall be some evidence in support of the findings of the commissioner.

The undisputed facts in reference to the second specification are that the relator and another officer, one Isenberg, arrested Maurice

McMahon, Jr., on suspicion that he had been guilty of larceny. The boy was taken to the station house and locked up over night, and the following morning he was arraigned before the Children's Court and discharged, no direct evidence being adduced against him. Maurice McMahon, the boy's father, who had known the relator for twenty-five years or more, and had, up to this time, been friendly with him, met him and asked about the arrest of his son, having in the meantime retained a lawyer in his behalf. The father testified as follows: "The defendant and his friend came along. I said, 'You know my boy; you had no right to arrest him; is there a chance of getting him out?' He said, 'Yes.' I said, 'What has he done?' He said, 'It doesn't amount to anything; he has just got a watch and some money.' He said there wasn't anything to the charge against the boy. I said, 'I wished I knew that for I have engaged a lawyer for \$5.' He said, 'You did not need a lawyer; the boy will be discharged.' I said, 'I will get even.' When the boy was discharged I signed a note, a receipt for a ring and \$12. He gave it to me in my hand. In the meantime the lawyer came out and says, 'The boy has \$12 on him; don't I get my share?' I said, 'I don't care who gets it.' I said, 'I want the boy.' The boy came out and I got the watch from the boy, and the boy said, 'I tell you what you can do; pawn the watch and let me have five.' I said to the boy, 'I will do that.' This officer had no right to arrest my boy, and I came down and seen Mr. Brooks and this gentleman and told them I was going to give Maguire \$5 at 8 o'clock and I told them where. They told me they would be up there at 8 o'clock and give me the \$5. I went up there at 8 o'clock and got the money and he walked past me and I went after him and put the five dollars in his hand. He said, 'What's this?' I said nothing and went over and took a car."

It seems from the evidence that upon the boy being discharged, and after McMahon had threatened to get even, he inquired of the relator where he was going to be that evening and was told that he had an appointment with a man at Seventy-fifth street and Avenue A at eight o'clock. With this information in his possession McMahon went to Inspector Walsh and reported that he was going to give Maguire five dollars. The inspector furnished the money, which McMahon forced into the hands of the relator and then, as he says,

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"ran and took a car," giving the relator no opportunity to refuse the money. In pursuance of the plan the inspector came upon the relator soon afterward, who at once admitted that he had the money, and explained the facts, and these are in nowise disputed; on the contrary, are strongly corroborated. We look in vain for any evidence that the relator accepted this money; it was placed in his hand by a man who had pretended to be his friend, and who ran away without making any explanation. The relator made no attempt to deny that he had the money. He has always told a straightforward story in relation to it, in entire harmony with McMahon's own version of the occurrence. The whole transaction appears to have been worked up for the purpose of carrying out the threat of McMahon to get even with Maguire for arresting his son. The evidence negatives the proposition that the money was received in violation of rule 22 of the Police Manual, or of section 306 of the Greater New York charter,* and it fails to establish the second specification of the charge.

Under the conceded facts the relator did not accept the five-dollar bill; he did not take it and turn it to his own purposes as a matter of free will at all; it was forced upon him without explanation. It is not pretended that it came to him in pursuance of any previous arrangement or understanding, expressed or implied, and, so far as we know, it may have been his intention to restore the money as soon as he met McMahon. He was in the discharge of his duty at the time the money was placed in his hand; he was at the point mentioned in pursuance of an arrangement to meet a man who was to give him information in reference to a burglary, and he appears to have been the victim of a malicious desire on the part of McMahon for revenge.

The determination of the police commissioner not being supported by evidence, the proceedings should be annulled and the relator reinstated, with costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Proceedings annulled and relator reinstated, with costs. Order filed.

* Laws of 1901, chap. 466.—[REP.]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSEPH KLEIN, Appellant, Impleaded with ABRAHAM COHEN, Defendant.

First Department, January 25, 1907.

Crime — grand larceny in the second degree — conviction of one aiding in larceny sustained.

The defendant was indicted with another for the crime of grand larceny. On the trial it appeared that the defendant did no physical act in consummation of the larceny, which consisted in opening a woman's purse and taking money therefrom while she was standing in a crowd. The evidence showed that the defendant and his companion had been conferring together and acting in a suspicious manner and that the defendant closely followed his companion when the latter opened the pocket book. On the whole evidence,

Held, that judgment of conviction should be affirmed.

McLAUGHLIN, J., dissented, with opinion.

APPEAL by the defendant, Joseph Klein, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 20th day of August, 1906, convicting the said defendant of the crime of grand larceny in the second degree.

John R. Heinzelman, for the appellant.

Robert S. Johnstone, for the respondent.

LAMBERT, J.:

The appellant was indicted with one Abraham Cohen in the Court of General Sessions, charged with the crime of grand larceny in the second degree. They were both convicted, the defendant Klein alone appealing. It is urged on the part of the appellant that the learned court erred in submitting the case against Klein to the jury, and while it must be admitted that the evidence was not as conclusive as might be desired in a case of this character, we are of opinion that it was not error to submit the question of guilt, and that the evidence is sufficient to support the judgment of conviction.

The evidence shows that one Antoinette Bally, the complaining witness, was upon one of the public highways of the city on the 16th day of July, 1906, watching a parade to celebrate an Italian holiday. The defendant Cohen approached her, put his hand into her purse and extracted a five-dollar bill, and was arrested by

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Policeman Bonanno while engaged in the act. Simultaneously the defendant Klein, who was immediately behind the complaining witness, and within two feet of her, was arrested by Officer De Guida. Cohen was convicted, and does not appeal. Officer Bonanno testifies that he was on duty on One Hundred and Fifteenth street, near Second avenue, with Officer De Guida, when they saw the defendants Cohen and Klein standing there and acting in a suspicious manner; that these officers watched the two for about ten minutes; that the complaining witness and two or three other women passed along, and that the witness saw Cohen follow the women, and "the big one (Klein) right after him;" that the officers crossed the street and the witness saw Cohen with his hand in the woman's bag and grabbed him, the latter dropping a five-dollar bill, which was recognized as belonging to the complaining witness. The defendants had been talking together; were walking in the opposite direction and talking, and Cohen turned to go in the opposite direction and Klein followed him, and was immediately back of and in supporting distance of Cohen when the latter opened the purse and took the money, and while it is true that Cohen denied knowing the defendant Klein, the credibility of his evidence, in view of the conceded facts, was one for the jury. Klein is not shown to have raised his hand or to have done any physical act in consummation of the crime, but he was in a position to do so; his act in following the defendant Cohen, talking with him up to the very moment of the crime, and the fact that he had changed his course apparently for the very purpose of being at hand, in connection with the other circumstances, is sufficient to support the verdict in this case.

We do not find error in the charge; the trial court has a right to discuss, temperately, the conditions which are of common knowledge in relation to the commission of crime, for the purpose of impressing a duty upon the jury, and we are of opinion that the court was well within its discretionary powers in the language used in the charge, to which no exception was taken. It is true, of course, in a criminal case this court is not necessarily limited to the consideration of exceptions, but where there is a mis-statement of the law, and the question goes merely to the discussion of the court, it will rarely avail to overrule a judgment of conviction; certainly not where the charge is criticised for no other defect than that of

calling attention to abuses well known to exist, and which it is the policy of the law to prevent, so far as possible, by the administration of justice.

The judgment should be affirmed.

INGRAHAM and HOUGHTON, JJ., concurred; PATTERSON, P. J., concurred in result: McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I dissent. The only evidence in this case to connect the appellant Klein with the crime charged, or by which an intention to participate in the larceny may be shown, is to the effect that Klein was first seen to walk in an easterly direction along One Hundred and Fifteenth street, about twenty feet from the corner, stop and retrace his steps; that he was then accosted by defendant Cohen, and the two talked together for ten minutes; that Antoinette Bally passed, accompanied by two or three other women, pushed on "one side and the other side" by the crowd there gathered to witness the Italian festival then in progress; that Cohen followed the woman, with appellant Klein "right after him;" that Cohen was seen to put his hand in the woman's handbag, and, being seized by witness Bonanno, dropped the five-dollar bill; that at this time appellant Klein was two feet back of them in the crowd.

The woman, who testified that she was walking in a "big crowd," made no charge against defendants, having been unconscious of the attempted theft until the boys were arrested, and it affirmatively appears that Klein was seen to do no act of participation in the crime.

I am of the opinion that evidence of Klein's presence in the neighborhood of the scene of the crime, in a crowd, any member of which might have been similarly accused had Cohen been seen to have previously addressed him, following a conversation *of another's seeking*, was not sufficient under the circumstances to warrant sending the case to the jury; that to do so permitted the finding of a verdict on a mere conjecture; and that by affirming the judgment, this court is about to sanction a verdict which has but conjecture and suspicion to sustain it.

I think, therefore, that the judgment should be reversed.

Judgment affirmed. Order filed.

ALFRED S. BROWN, Respondent, v. LEE ANNA BROWN and Others;
Defendants, Impleaded with HERBERT J. CARRINGTON and Others,
Respondents, and AUGUSTA A. BROWN, Appellant.

First Department, January 25, 1907.

Husband and wife — ante-nuptial agreement — when agreement not in lieu of dower.

A pecuniary provision made for the benefit of an intended wife must be made in lieu of dower to bar her right thereto. Dower is favored by the law, and if there be a reasonable doubt as to whether an ante-nuptial agreement was made in lieu of dower, the widow will take both.

When a man ninety years of age, in consideration of a contract of marriage made by a woman much younger than himself, agrees in writing that his executors shall pay a certain sum to his intended wife if he die within three years and a larger sum if he die within five years, and that after his death she shall be paid a monthly sum for her support until the division of his estate when "she is to be paid in full as her widow's dower in full," and such contract is followed by a ceremonial marriage, the ante-nuptial agreement should not be construed to have been made in lieu of dower and the widow is entitled both to the dower and the provisions of the contract.

(Per INGRAHAM, J.): The only effect of the acceptance of the provisions of the ante-nuptial agreement by the widow was to postpone her right to dower until final division of the estate, and when the will is invalid for unlawfully suspending power of alienation, the estate becomes at once divisible, the widow's right to the annuity ceases and she is entitled to her dower.

PATTERSON, P. J., and HOUGHTON, J., dissented, with opinion.

APPEAL by the defendant, Augusta A. Brown, from an interlocutory judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 21st day of June, 1905, upon the decision of the court, rendered after a trial at the New York Special Term, in a partition suit, denying to said defendant dower or a share in the personal property of her deceased husband.

Louis J. Altkrug, for the appellant.

Joseph Fettretch, for the respondents.

LAMBERT, J. :

Paul S. Brown died on the 30th day of August, 1901, intestate as to the property involved in this action. On the 10th day of July

1901, Mr. Brown entered into an agreement with the defendant Augusta A. Brown, which was followed by a ceremonial marriage on the twenty-fourth day of August in the same year. He was at that time about ninety years of age, in the full possession of his faculties, so far as appears from the evidence in this case, and on the date of the agreement he wrote out and the parties subscribed the following contract:

"This agreement made and entered into by and between Paul S. Brown of the town of Bloomfield, State of New Jersey, party of the first part, and Augusta Andree, of the City of New York, * * * party of the second part, Witnesseth: That for and in consideration of this agreement and certain sums of money to be paid to her by the said party of the first part and other valuable considerations, the said party of the second part promises to marry the said party of the first part some day before July 15, 1901, and by mutual agreement become legal husband and wife. Certified by their signatures and seals and by two disinterested witnesses to same.

"The said party of the second part; * in case of the death of said Paul S. Brown within three years the said Augusta Andree shall be paid by the executors of the last will and testament of said Paul S. Brown, three thousand Swedish crowns, but if he lives five years from the date of this agreement, she, the said Augusta Andree, * * * shall be paid five thousand Swedish crowns, or its equivalent in American money, and after his death she is to be paid forty dollars per month for her support until the division of the estate, when she is to be paid in full as her widow's dower in full."

What is the reasonable construction of this language used by Paul S. Brown in defining the rights of this woman, who at the age of thirty-seven years was about to enter into the marriage relation with him? Clearly Mr. Brown used language with a fair degree of intelligence in defining his purpose. He evidently understood that at his age he had not many years to live, while his wife could reasonably expect to survive him for a number of years. Augusta A. Brown was comparatively young; she was a trained nurse and she was relinquishing her occupation for the purpose of caring for this old man, and she evidently demanded something more than

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the rights of a wife in the property. It was agreed, therefore, that if Mr. Brown died within a period of three years the said defendant to be paid 3,000 Swedish crowns, equivalent to \$810. But if he lived for five years, she was to be paid 5,000 Swedish crowns, "and after his death she is to be paid forty dollars per month for her support until the division of the estate, when she is to be paid in full as her widow's dower in full." That is, contingent upon the length of life of Mr. Brown, his executors were to pay her 3,000 or 5,000 Swedish crowns out of his property, the same as they would be called upon to pay or discharge any other indebtedness. In addition to this they were to pay to the said defendant a fixed sum per month for her support during the time that the estate was held by the executors, and then "she is to be paid in full as her widow's dower in full." There is no suggestion here that these several payments, or any of them, are in lieu of dower, nor is there any inconsistency between such payments and her right of dower. The parties understood that the widow would have dower rights; they contracted with reference to such rights, and they did not, in express language, nor by necessary implication, exclude her from such rights. On the contrary, the contract provided for certain definite payments under agreed conditions, and then, upon the division of the estate she was to be "paid in full as her widow's dower in full."

The statute provides (Real Prop. Law [Laws of 1896, chap. 547], § 178) that "any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her * * *, bars her right or claim of dower in all the lands of her husband," but it must be made in lieu of dower; the parties have a right to provide for more than the dower, and this, it seems to us, has been done in the contract under consideration. At least there is no language which compels the conclusion that it was the intention of the parties that the said defendant should be entitled to less than she would have been entitled to without the contract. Dower is favored by the law, and while the right to both dower and the benefit of a testamentary provision must yield to the intent of the parties where such intent is stated or clearly implied, if there is reasonable doubt, the widow takes both (*Matter of Gorden*, 172 N. Y. 25, 28), and it cannot be said, in

the case now before us, that there is any lack of reasonable doubt. Mr. Brown drew this contract; the language was of his own choosing, and it is quite as consistent with reason, in view of the circumstances, that he intended that the said defendant should have more than her dower rights, as it is to hold that there was an intention to limit her to the comparatively small amount which she would realize in the event of Mr. Brown's death within a period of three to five years. The court in *Matter of Gordon (supra)* quote the rule that "where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds," and if this rule is applied to the contract before us, and its language is given its most obvious meaning, the defendant was entitled to succeed in her contention.

The learned court below finds it necessary to read into the language used by Mr. Brown a word of extensive meaning in order to reach the result which we are called upon to review, and we do not think the case is one where we are justified in supplying language. The words are not merely those of Mr. Brown, acting as a testator; they are the words of a mutual contract — words selected by Mr. Brown — and if he failed to use language which will deprive the defendant of her dower rights, his heirs cannot be aided by the court. Under the statute the defendant is entitled to "be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage." (Real Prop. Law, § 170.) This is the lawful right of this defendant unless the right has been taken from her by this contract, and we have no authority to add anything to the language which the contracting parties have used to bring about such a result. She had a right to refuse to marry Mr. Brown and to accept merely the rights of his widow; she had a right to stipulate for something more, and a fair construction of the language chosen by Mr. Brown to express the agreement with this defendant does not justify holding that it was intended that the rights of the defendant should be cut down, but rather enlarged. We find nothing to warrant holding that the specific payments provided for out of the estate of Mr. Brown were intended to be in lieu of dower.

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The judgment should be modified by providing that the widow shall be entitled to her dower right in the estate in addition to the provisions of the contract. Costs of this appeal to the defendant Augusta A. Brown. The order to be settled on notice.

McLAUGHLIN, J., concurred; PATTERSON, P. J., and HOUGHTON, J., dissented.

INGRAHAM, J. (concurring):

I concur with Mr. Justice LAMBERT. An analysis of the antenuptial agreement shows that it is fairly divided into two parts. The first part contains the mutual promises of the parties to the agreement, and the second part relates to the agreement on behalf of the proposed husband. The first part witnesseth "that for and in consideration of this agreement and certain sums of money to be paid to her by the said party of the first part (proposed husband), and other valuable considerations, the said party of the second part (proposed wife) promises to marry the said party of the first part some day before July 15, 1901."

Here is a distinct promise by the proposed wife to marry, and this promise to marry is based upon the consideration of the money therein provided to be paid to her. This is the only promise that she makes in the agreement. Whatever rights she would have as a wife were preserved to her by the agreement, and certainly in any part of the agreement which contains her promise there is no relinquishment of any legal right to which she would be entitled upon her marriage. Now, the second part of the agreement makes provision for the sums of money which were to be paid to her, and which were a part of the consideration for making the promise of marriage. Under that agreement she is to be entitled to receive a certain sum of money upon the death of the husband. Subsequent to his death she is entitled to receive an annuity of forty dollars per month, to continue during the time that the husband's estate is undivided, "when (at the time of the division of the estate) she is to be paid in full as her widow's dower in full." I do not think that this language can be construed into an agreement to relinquish dower, or into an agreement that the payment of these various sums of money is to be considered in lieu of dower. Certainly, if this

provision was in a will which purported to make provision for the testator's wife, it could not be held to be a provision in lieu of dower, an acceptance of which would estop her from claiming dower after the period during which she was entitled to receive the annuity. Turning to the will of the testator, as it existed at the time this agreement was made, the meaning seems to become apparent. The testator had intended to tie up his estate for a period of twenty-six years, during which time the income from his property was paid to his children in fixed sums per month. Undoubtedly, the intent was to provide for this annuity to his widow in lieu of her right to receive during the period that his estate was undivided a third of the income of the real property. Under the ante-nuptial agreement she was to receive a sum of money upon his death. She was then to receive a certain annuity during the time that the estate remained undivided; but upon the division of the estate the annuity was to cease, because at that time she would be entitled to her dower in his real property. I think that the only effect of the acceptance of the provision made for the widow by the ante-nuptial agreement would be to postpone her right of dower until the final division of the estate. It having been adjudicated that this will was invalid as suspending the vesting of the testator's real property during a period not allowed by the statute,* the estate became at once divisible, and the widow's right to receive this annuity ceased, and she then became entitled to her dower in the real property.

I concur, therefore, in the modification of the judgment as proposed by Mr. Justice LAMBERT.

PATTERSON, P. J. (dissenting):

I am in accord with the views expressed by the justice at Special Term respecting the construction to be given to the agreement entered into between the defendant, Augusta Andree (Brown) and Paul S. Brown, prior to their marriage. Limiting the interpretation of that agreement to the subject of dower, and without reference to any question that might arise respecting an interest of the widow in the personal estate of her deceased husband, it seems to

* See *Brown v. Quintard* (177 N. Y. 75); Real Prop. Law (Laws of 1896, chap. 547), § 82.—[RE.]

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me that the agreement can only be construed as a relinquishment by ante-nuptial agreement of her right of dower in the real estate of her husband and the substitution of a money recompense for her relinquishment of that dower.

The agreement recites that for and in consideration thereof, and of certain sums of money to be paid to Augusta Andree by the party of the first part and other valuable considerations, she promised to marry the party of the first part, and it was agreed that if he died within three years, she should be paid by the executors of his will the sum of 3,000 Swedish crowns; if he lived five years, she was to receive 5,000 Swedish crowns, or the equivalent in American money, and after his death to be paid forty dollars a month for her support until the division of his estate, "when she is to be paid in full as her widow's dower in full."

I think this provision specifically relates to dower as such, and that the amounts to be paid to her under the provisions of the agreement were in commutation of dower. The testator did make provision by his will for the forty dollars a month. By its terms that provision was to continue for about twenty-six years, and if the widow were to receive dower in addition to this provision for so long a time, the whole scheme of the will would be subverted, as it was all to be virtually in lieu of dower. The fact that the Court of Appeals declared this provision of the will to be invalid does not affect the construction to be given to the agreement. As I understand it, it relates to dower, and was intended to relate to that subject, and was a complete acquiescence by the intended wife in the acceptance of a sum of money in lieu of dower.

I think, however, that some provision should be made in the judgment to the effect that it shall not be a bar to the right of Mrs. Brown to assert any claim she may have to share in the personal estate of her deceased husband; and while the action is in partition and the judgment merely declares that the 3,000 Swedish crowns, or its equivalent, and the sum of forty dollars a month from the time of the death of her husband until the actual division of the estate shall be paid her in full for thirds, dower, and right of dower to all or any other interest described in the complaint, yet it might be claimed that it was an adjudication that all her interest in the estate was disposed of by the decree.

With such a provision inserted in the judgment, I am of the opinion that it should be affirmed.

HOUGHTON, J., concurred.

Judgment modified as directed in opinion, with costs of appeal to defendant appellant. Settle order on notice.

WILLIAM W. APPLETON and DANIEL APPLETON, as Trustees under the Last Will and Testament of JAMES E. COOLEY, Deceased, Respondents, v. MAX MARX, Appellant.

First Department, January 11, 1907.

Landlord and tenant — covenant by tenant to make repairs — liability of tenant on surrendering building in bad condition — tenant not relieved by covenant of new tenant to repair.

Where a tenant covenants to make all needful repairs to the premises during the term, and to surrender them in as good state as reasonable use and wear will permit, etc., the tenant upon leaving the premises in poor condition is liable for the cost to the landlord of putting them in proper repair.

This rule holds, although before the expiration of the term the landlord leased the premises to a third party, who makes a similar covenant to put the demised premises in repair, by which the cost of putting the premises in repair fell upon the new tenant. This, because the tenant surrendering the premises is not a party to the agreement.

But the landlord in making repairs cannot charge the outgoing tenant with the cost of installing a new elevator and pump when the old elevator was capable of repair.

Other item for cost of painting disallowed.

LAUGHLIN, J., dissented.

APPEAL by the defendant, Max Marx, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 13th day of November, 1905, upon the report of a referee, and also from an order entered in said clerk's office on the 10th day of November, 1905, granting the plaintiffs an extra allowance.

Charles Strauss, for the appellant.

J. Hampden Dougherty, for the respondents.

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Judgment affirmed, with costs, on opinion of referee. Order filed.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

PER CURIAM:

The judgment is affirmed on the opinion of the referee. All concur, except LAUGHLIN, J., who dissents upon the grounds of error in allowing recovery for items not embraced in bill of particulars and for incompetent and insufficient proof of reasonable cost of making required repairs.

The following is the opinion of HAMILTON ODELL, Esq., referee.
ODELL, Referee:

It is admitted by the defendant that he has failed to pay to the plaintiffs the sum of \$1,000, part of the rent which became due by the terms of the lease on the 1st day of April, 1902.

The defendant covenanted that "he will make all repairs inside and outside of the said building which may be needful to the demised premises during his term, including repairs to all plumbing work and pipes, and will keep the demised premises in good order and repair during his term, at his own expense, and * * * will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." The plaintiffs allege that the defendant failed to keep these covenants; that he did not maintain the premises in good condition, but allowed them "to fall into and remain in a condition of dilapidation and disrepair, and quitted and vacated the same while in such condition," by reason whereof the plaintiffs have sustained substantial damage.

Covenants of this character have been frequently considered by the courts, and are no longer of doubtful meaning. In *Green v. Eden* (2 T. & C. 582) the covenant was "to keep the whole of said house and premises in good repair and condition during the said demised term." It was held that the tenant was bound to repair defects existing at the time he took possession. In *Lockrow v. Horgan* (58 N. Y. 635) the covenant was "to make all necessary repairs and to keep the same in tenantable order at his own cost." The premises became untenable by reason of the settling of a

wall owing to defective construction of the foundation. The court said the tenant "was bound to make the repairs irrespective of the cause of the defect." In *Lehmaier v. Jones* (100 App. Div. 495) the lessee covenanted "that he will keep said premises in good repair at his own expense during said term, * * * and at the expiration of the said term * * * will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." The action was against the lessee for damages for failure to keep and leave the premises in good repair. No proof was given by the plaintiffs as to the condition of the buildings when the lease was made. They rested their right to recover upon the fact that the buildings were out of repair when possession was surrendered by the defendant. His contention was that his covenant should be construed "as if it provided that if the tenant desired any repairs he should make the same at his own expense, and that, therefore, it was incumbent on the plaintiffs to show that the premises were in a better state of repair when the lease was made than at the expiration of the term." The court held otherwise, saying that by the covenant the tenant was obligated not only to keep the premises in as good repair as when he entered, "but to put, keep and leave in good repair, having due regard to the age and class of the buildings," and this construction the court said "is sustained by authority."

The building in question in this case was an old building, erected many years ago, but there is no proof that when the defendant took possession or at any later time its foundations or walls were not in good condition or that it was otherwise structurally weak. In 1887 it was leased for a term of ten years to the New York Steam Company, and that company expended in alterations and repairs upwards of \$33,000. When the lease to the defendant was made it was clearly understood by both parties that to put the building in proper repair would require a considerable outlay, and it was stipulated in the lease that towards these repairs the lessors should contribute the sum of \$1,000, which they did. The duty of making all repairs in excess of this sum, and of keeping and leaving the building in good condition, was assumed by the defendant by the covenants which have been referred to.

I must find as a matter of fact that the defendant did not leave

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the building in good condition. Upon this point the testimony of witnesses is in sharp conflict, but, in my judgment, the weight of testimony, all things considered, is plainly in favor of the plaintiffs. The measure of their damages is the necessary cost of making the repairs. (*Lehmaier v. Jones, supra.*) The amount they claim for damages is \$5,982.88. It is, I think, excessive. Some of the items should be disallowed.

They claim \$1,000 for repairing the elevator. The testimony of the architect is: "In the estimate received for repairing the elevator and car the amount was approximately \$1,000." The cost of repairing the car was \$200, and for that a separate claim is made. The elevator was an old one and operated by hydraulic or steam power, the architect is not certain which. It was not repaired, but a new and modern elevator operated by electricity was put in at an expense of \$2,000. It is not claimed that this was a necessity or that the old elevator was incapable of repair. Mr. Leeming, the architect, says: "It was deemed unwise and unsafe to use the then present elevator, and it was deemed unbusinesslike to expend the amount of money which would be necessary for repairs to the then present elevator, when, for a certain greater sum, a new elevator could be installed." So that it seems that the plaintiffs did not choose to hold the defendant to the terms of his covenant. They elected not to repair at his expense, but to put in new machinery of an improved and essentially different character. My opinion is that they have no right to charge the defendant with the cost of that improvement to the extent of what repairs to the old machinery would have cost had they been made.

The same objection lies to the item of \$177.10 for "elevator pump." This pump was a Worthington steam pump, and was used to raise water to the tank on the roof. Mr. Leeming testifies as follows: It "was in very poor condition indeed. I cannot say anything positively now as to its exact condition, except that after consultation, it was decided that it was absolutely necessary to remove it and to put in a new pump. * * * (It) was deemed unfit for use; it was deemed impossible to repair it, and a new elevator pump was put in." When asked on cross-examination what was the matter with it he said it leaked. It "needed repacking, and was badly worn." There is testimony, and it is not contradicted,

that the pump was in working order and in use down to the time the defendant quitted the premises. There is no testimony that it at any time failed to do the work for which it was provided. The cost of the new electric pump is disallowed.

The plaintiffs claim to recover the sum of \$441 as the cost of "painting walls, &c., in building," and the further sum of \$600 for "painting." Concerning the first item, the architect says: That "was the total expense for putting the woodwork in the halls and the woodwork of the rooms in proper condition. * * * (It) covered the painting of the old woodwork in the halls and in certain offices in the building — not all of them — and it covered the painting of the walls and ceilings, the window frames, the roof, the new tank house, and such work in the building as required painting to put it in a good state of repairs. * * * Painting the sash and frame and trim of the building, varnishing the old worn-out woodwork, and all the general work required to put the old work in good condition, \$375." He further testified that the general contractor for the mason and carpenter work, plastering and "general overhauling" of the building "did some work," the cost of which, included in the original estimate, was \$600, and that the said contract covered various items of repairs, including an item of \$600 "for painting." In my judgment, the testimony, read together, does not warrant the allowance of this \$600 item.

The remainder of the plaintiffs' claim for damages (except the item of \$25 for a metal ceiling), amounting to \$4,180.78, should, I think, be allowed, provided the plaintiffs have any right of recovery on such claim, which the defendant denies.

The proofs show that in April, 1901, a full year before the expiration of the defendant's term, the plaintiffs leased the said premises to the Waterman Company for five years from May 1, 1902, and that the lease contained a covenant similar to that contained in defendant's lease, that is to say, the Waterman Company engaged to, "at its own expense, make all repairs inside and outside of the said building which may become needful during the said term, including repairs to all plumbing work and pipes, and keep the demised premises in good order and repair during the said term;" and they show also that the repairs to the building which were made necessary by the defendant's default were made by and at the

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expense of the Waterman Company. Upon these facts it is argued that the defendant is not liable upon his covenant, because the plaintiffs sustained no damages through his non-performance. The same argument was overruled by the English Court of Appeal in *Joyner v. Weeks* (L. R. 2 Q. B. Div. [1891] 31). In that case the defendant had covenanted to keep and leave the premises in good repair, which he failed to do, and the plaintiff recovered damages. The defendant's lease expired in 1889. In 1887 the plaintiff made a lease of the same premises to another party, to begin at the close of the defendant's term. The court assumed that the second lease required the new tenant "to put the premises into the same state of repair as was required by the first lease." The Master of the Rolls (ESHER) said: "In my opinion, the contract between the plaintiff and the third person cannot be taken into account; it is something to which the defendant is a stranger." FRY, L. J., concurred in this, saying: "It appears to me that it is *res inter alios acta*, with which the lessee has nothing to do and which he is not entitled to set up. How can subsequent performance by the second lessee of the covenants which he has entered into abridge or take away the cause of action that vested in the lessor before the second lease took effect? * * * The second lease passed no estate until possession was taken under it. * * * The lessor had a right of entry on the determination of the first lease. Directly that happened, a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore, the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease." *Rawlings v. Morgan* (18 C. B. [N. S.] 776) and *Morgan v. Hardy* (L. R. 17 Q. B. Div. 770) are in harmony with this decision. The claim for damages is, therefore, sustained to the extent mentioned above.

The defendant has interposed a counterclaim, alleging that, by false and fraudulent statements made by authorized agents of the plaintiffs with knowledge of their falsity and with intent to deceive, and on which he relied, he was induced to enter into the lease of the premises and damaged to the extent of \$24,000. The testimony does not support the claim.

The plaintiffs are entitled to judgment for \$5,180.78, with interest on \$1,000 from April 1, 1902.

GUY WITTHAUS, Respondent, v. ELEANOR A. CAPSTICK, Defendant,
Impleaded with ROBERT E. SHERWOOD, Appellant.

First Department, January 18, 1907.

**Foreclosure — lease by receiver of rents and profits — lease not canceled
on summary application.**

When in an action to foreclose a purchase-money mortgage, a receiver of the rents and profits, who is authorized to lease the premises, continues the lease to the tenant then in possession in consideration of an agreement by the tenant to expend money in repairs, the court is without jurisdiction to order a summary cancellation of the lease.

It seems, moreover, that in an action in equity to compel the cancellation of the lease the tenant would be entitled to protection for the amount expended by him in repairs.

On such summary application to cancel the lease it is immaterial that the receiver of the rents, though appointed as receiver of only a nine-tenths undivided part of the premises, made a lease of the whole premises.

APPEAL by the defendant, Robert E. Sherwood, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of November, 1906, directing the cancellation of a lease made to said defendant by a receiver in foreclosure.

H. Aaron of counsel [*Parker & Aaron*, attorneys], for the appellant.

Joseph H. Hayes of counsel [*Francis X. Butler*, attorney], for the plaintiff, respondent; [*Wray & Pillsbury*, attorneys], for the respondent Capstick.

CLARKE, J.:

The action was brought to foreclose a purchase-money second mortgage for \$51,500 on premises 144 Fulton street in the city of New York, executed by the defendant Capstick to the plaintiff on her undivided nine-tenths interest in said premises. At the time the mortgage was executed, ownership of the remaining undivided one-tenth interest was considered uncertain. Witthaus, therefore, conveyed only the unquestioned nine-tenths interest to Miss Cap-

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stick, who gave back the mortgage mentioned, and, under the contract of sale, a partition suit was thereafter begun by Miss Capstick, which resulted in the entry of the interlocutory judgment on October 26, 1906, before the execution of the lease here under consideration, determining that the remaining one-tenth interest was vested absolutely in Mr. Witthaus, subject only to his wife's right of dower. By agreement between the mortgagor and the mortgagee final judgment of foreclosure and sale in this action was not to be entered. Final judgment in the partition suit was, however, to be entered, and Miss Capstick was then to pay plaintiff the value of the remaining one-tenth interest and receive a deed from plaintiff for such one-tenth interest, whereupon plaintiff's interest in the premises would cease and Miss Capstick would become the sole owner. The negotiations had proceeded so far that Miss Capstick asked for a loan of \$142,000 to carry out the plan as arranged, and it was while examining the title for such loan that the attorneys for the lender discovered the lease in question.

The summons, complaint and notice of pendency of action were filed in the New York county clerk's office on August 21, 1906. On August 31, 1906, an order was entered appointing a receiver of the rents and profits of the premises affected by said mortgage, which, among other things, provided: "That said receiver is hereby authorized, from time to time, to rent or lease, as may be necessary, for a term not exceeding one year, said premises."

The premises consist of a single lot of ground with a five-story and basement building thereon. When the receiver went into possession, under the above order, he found that the appellant, Robert E. Sherwood, was in possession thereof as tenant and that he had been such tenant since the 20th of September, 1901, paying a rental of \$300 per month which he had theretofore promptly paid and continued to pay to the receiver. On October twenty-seventh Sherwood wrote to the receiver as follows: "The roof is in a very leaky condition and will have to be gone over with tar before the cold weather sets in. This, together with other necessary repairs, which will have to be done at once will necessitate an outlay by me to the extent of at least \$500. All repairs that we deem necessary we are willing to do at our expense, provided we are given a lease for a year, otherwise we will vacate the premises." Thereafter, on the 3d of

November, 1906, the receiver and Sherwood executed a written lease under seal which was duly recorded, under which the receiver leased the premises for the term of eleven months from the 1st day of November, 1906, to the 30th day of September, 1907, at the rent of \$300 per month, the same that he had theretofore been paying, the tenant agreeing to make all necessary repairs at his own cost and expense. Thereafter Sherwood proceeded to expend considerable sums of money for repairs to roof, lead pipes, windows and floorings and had other repairs under way. He made his business arrangements on the basis of such lease. He obligated himself in the sum of \$40,000 in the purchase of books, music and stationery in which he dealt for the holiday trade for this year and to provide for a stock of merchandise during the future months of said lease.

On the 19th day of November, 1906, an order to show cause was obtained why the said lease should not be canceled, and upon the return of said order and upon the motion of counsel for both the plaintiff and the defendant Capstick, the court granted an order canceling and annulling said lease. From said order the tenant appeals.

Whatever control the court may have over the action of a receiver appointed by it, it does not seem that it should extend so far as to authorize the summary cancellation of a written lease, which, under the provisions of the order appointing him, the receiver had power to make. The lease was made to the same tenant whom he found in possession and who seems for five years to have been acceptable to the owners at the same rental theretofore paid to them. It was made after negotiations, in consideration of the condition of the building as to repairs, upon the statement that if the lease was not made the tenant would vacate, as he had a right to do, and upon the inducement that he would expend a considerable amount for the repairs. Upon the faith of the lease when made the tenant acted by making the repairs and by obligating himself for large sums of money for the continuance of his business at the said place. The court was without power summarily to deprive him of his property and rights.

If an action had been brought in equity to set aside the lease for any reason cognizable in equity the tenant would have been entitled to show the acts done by him in good faith and reliance thereon

and to receive equitable consideration in regard to amounts expended and obligations incurred.

Nor does the claim that the receiver leased the whole premises when, by order of his appointment, he was the receiver of only nine-tenths undivided part thereof, appeal to us as a ground for sustaining this order. That may be for consideration between the owners as to the apportionment of the rent received, but is no ground for a summary cancellation of the lease.

The order appealed from should be reversed, with ten dollars costs and disbursements to the appellant Sherwood, and the motion denied, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements to appellant Sherwood, and motion denied, with ten dollars costs. Order filed.

COHN-BAER-MYERS & ARONSON COMPANY, Appellant, v. REALTY TRANSFER COMPANY and MARY J. CUNNINGHAM, Respondents.

First Department, January 11, 1907.

Pleading — complaint against several defendants asking alternative relief — failure to state cause of action against either defendant.

Neither at common law nor under the Code of Civil Procedure can a plaintiff join two defendants upon the theory that he has a right to relief against one or the other of them.

If, however, the complaint alleges facts which show that he is entitled to relief, legal or equitable, against one of the defendants joined, the complaint will be sustained as against him.

But when a complaint against two defendants asking alternative relief does not state a cause of action against either, the complaint should be dismissed. While tender may not be a prerequisite to an action in equity, yet, where a party entitled to an assignment or conveyance of property upon the payment of money goes into court to enforce that right, the complaint must make an offer to pay the amount.

A complaint alleged in substance that the plaintiff having a contract to purchase lands assigned the same to a defendant corporation, which paid the plaintiff a part of a bonus therefor under an agreement whereby, if the assignee should

fail to acquire title without fault on its part, the contract should be reassigned and the bonus repaid by the plaintiff. The assignee did not acquire title to the property, and the plaintiff joined the assignee and the vendor as parties defendant, asking as alternative relief: (1) That the marketability of the title be adjudged and whether the failure of the assignee to take title was its fault. (2) That if the title be marketable and the assignee in fault that the vendor and assignee be decreed to perform and the assignee be adjudged liable for the balance of the bonus. (3) That if the title be unmarketable the assignment and contract of sale be canceled, etc.

No facts were alleged showing that the failure of the assignee to take title was due to its fault, and there was no demand for a reassignment or offer to pay the portion of the bonus received.

Held, that the complaint failed to state a cause of action against either defendant; That the plaintiff could not have the benefit of an allegation by the assignee that the vendor could not convey a marketable title, which allegation was denied by the plaintiff's reply.

A plaintiff cannot sustain a cause of action upon an allegation in the answer of a defendant, which he specifically denies by reply.

PATTERSON, P. J., and LAUGHLIN, J., dissented in part, with opinion.

APPEAL by the plaintiff, the Cohn-Baer-Myers & Aronson Company, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 31st day of March, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the plaintiff's amended complaint.

Edward W. S. Johnston, for the appellant.

Benjamin N. Cardozo, for the respondent Realty Transfer Company.

Daniel Daly, for the respondent Cunningham.

INGRAHAM, J.:

I concur with Mr. Justice LAUGHLIN in the opinion that this action cannot be maintained upon the plaintiff's theory of alternative relief as such an action is only justified where, on the facts stated, a plaintiff would be entitled to the alternative relief demanded against the same defendant or defendants. As I understand it, neither at common law nor under the Code of Civil Procedure can a plaintiff join two defendants upon a claim that he has a right to relief against one or the other of said defendants. (*Clark v. Lord Rivers*, L. R. 5 Eq. Cas. 91.) If, however, the complaint alleges

facts from which there follows the legal conclusion that the plaintiff is entitled to relief against a defendant named, the complaint can be sustained against the defendant against whom the plaintiff is entitled to relief, either legal or equitable. But the difficulty with this complaint is that no facts are alleged which show that the plaintiff is entitled to relief against either defendant. As against the defendant Cunningham there is no allegation to show that the plaintiff or its assignee would be entitled to a decree for specific performance or that there was a breach of his contract to convey. Nor does the complaint allege facts from which the legal conclusion that the plaintiff is entitled to any relief against the defendant Realty Transfer Company would follow, as it is not alleged that the failure of the Realty Company to obtain title to the property covered by the contract between the plaintiff and defendant Cunningham was or was not the fault of the Realty Company. If the Realty Company without justification refused to take title the plaintiff would have an action at law to recover its damages as for a breach of a contract, but to sustain such a cause of action a breach must be alleged.

The assignment by the plaintiff to the Realty Company provides that "should the Realty Transfer Company fail to obtain title to the aforesaid premises in accordance with the aforesaid agreement, without fault on the part of the said Realty Transfer Company, then this assignment shall be canceled and annulled, and any interest or rights passing hereunder to said Realty Transfer Company shall be reassigned and retransferred to" the plaintiff; and it was upon this contingency that the plaintiff was to return the \$4,000 paid on the execution of the contract to the Realty Company. The plaintiff alleges no facts that would justify a judgment for a reassignment of this contract by the Realty Transfer Company or justify a specific performance of that agreement, as it fails to allege that the Realty Transfer Company failed to obtain title to the premises without fault on its part. It is quite clear that the complaint was not framed upon any such theory, as no demand for such reassignment was made, and there is no offer to pay the \$4,000, nor is it tendered by the complaint. While it may be that a tender before the commencement of the action is not essential to maintain an action in equity, when a party entitled to an assignment or conveyance of property upon the pay-

ment of a sum of money comes into court to enforce that right the complaint must at least offer to pay the amount payable upon the transfer asked for.

Recognizing the liberal rule of pleading prevalent in this State to which Mr. Justice LAUGHLIN calls attention, I still think that to entitle the plaintiff to relief either at law or in equity, the complaint must state facts from which the legal conclusion follows that the plaintiff is entitled to some relief, and the complaint in this case failing to state such facts the action could not be maintained.

The allegation in the answer of the defendant Realty Company which in substance alleges that the defendant Cunningham could not convey a marketable title to the property contracted to be conveyed is an allegation made as a basis for affirmative relief against the plaintiff by the defendant Realty Company, and the plaintiff, by the reply, denied this allegation. The plaintiff cannot sustain a cause of action upon an allegation in an answer of a defendant which he specifically denied by the reply. I think the condition of the pleadings at the trial justified the court in dismissing the complaint as against both defendants.

The judgment appealed from should be affirmed, with costs.

CLARKE and HOUGHTON, JJ., concurred; PATTERSON, P. J., and LAUGHLIN, J., dissented in part.

LAUGHLIN, J. (dissenting in part):

The complaint was dismissed on motion of defendants separately made, on the pleadings and opening of counsel for plaintiff at the commencement of the trial, on the ground that it fails to state facts sufficient to constitute a cause of action of which a court of equity has jurisdiction.

The plaintiff and the defendant company are domestic corporations. The defendant Cunningham duly contracted, in writing, to sell and convey to the plaintiff certain premises therein described. situate in the borough of Manhattan in the city of New York, and bounded, so far as material to this case, northerly by One Hundred and Forty-first street, easterly by the former northwesterly line of Bloomingdale road and the northwesterly line of Hamilton place, and southerly by One Hundred and Fortieth street. The easterly boundary of the premises so contracted to be conveyed was speci-

fied in the contract to be the northwesterly line of Hamilton place and the northwesterly line of Bloomingdale road, as it formerly existed. The contract, after the description of the main parcel by metes and bounds, contains the following provision: "Together with all the right, title and interest of said party of the first part, of, in and to the land formerly included in said Bloomingdale Road and lying between the northwesterly line thereof and the northwesterly line of Hamilton Place, and immediately adjoining said above-described premises." The plaintiff alleges that this constituted a representation and warranty that the vendor had an easement of light, air and access in and to the parcel lastly-herein described. The plaintiff, for a bonus or advance of \$9,000, \$4,000 of which was paid in cash and \$5,000 was to be paid when title passed, by an instrument in writing, duly assigned the contract to the defendant company, and in the assignment requested and directed the vendor to execute the deed to the defendant company and covenanted that if so required by the vendor it would execute the bond and mortgage which it had agreed to execute to her. The assignee of the contract, in substance, agreed to perform the same for the assignor. The complaint shows that it was expressly agreed that if the assignee, *without fault on its part*, should fail to acquire title under the contract, the assignment "should be cancelled and annulled, and any interests or rights passing under the said agreement" between the plaintiff and the defendant company "should be reassigned and retransferred to this plaintiff, and simultaneously therewith this plaintiff should return and refund to" said Realty Transfer Company the sum of \$4,000 paid by it to plaintiff thereunder, and should also pay to it the reasonable charge for searching the title and necessary disbursements, or else transfer to it the right to collect the same from the vendor; that at the place prescribed in the contract between the vendor and vendee for performance thereof, and at a time to which performance had been postponed by their consent and the consent of the assignee, the vendor tendered to the assignee a deed of the premises and presented to it three bonds and mortgages, as prescribed in the contract, and requested the execution thereof by it, but that the assignee tendered the balance of the purchase price payable in cash and rejected the title upon grounds, in substance, omitting those waived by it, as follows:

(1) That the vendor had not of record or otherwise an easement of light, air and access in and to said strip of land lying to the east alleged to have been formerly part of Bloomingdale road, and that her representation in the contract that she had was untrue; (2) that the premises were subject to a restrictive covenant prohibiting the erection or use of a steam engine in any house thereon other than a private dwelling, hotel or apartment house, and (3) are subject to covenants contained in liber 1058 of Conveyances at page 452, and restrictive covenants, other than those specified in the contract, and (4) that the deed tendered was not in compliance with the contract in that it did not contain the representations as to the easement of light, air and access provided for in the contract. The plaintiff further alleges that thereupon it employed the Lawyers' Title Insurance and Trust Company, a domestic corporation engaged in examining and insuring titles, to examine the title, and it reported to plaintiff in substance that the title was objectionable upon all of said grounds upon which it was rejected by the defendant company, and that it would not insure the title; that plaintiff was also advised by counsel that said objections to the title "are of such gravity and weight as to render it extremely doubtful whether the title to said premises is marketable or unmarketable, and that it would not be safe or proper for this plaintiff to take title to said premises without the said objections having been passed upon by some court of competent jurisdiction;" that plaintiff relied upon the act of its assignee in rejecting the title, and thereafter itself rejected the title upon the same grounds. The plaintiff further shows the amount it has necessarily expended in having the title examined and that it does not know what expenses its assignee has incurred for the like purpose; and the value of the premises at all times between the date of the contract and the rejection of the title by the assignee. The plaintiff further alleges that it is unable to determine whether the inability to obtain title was without the fault of its assignee and that plaintiff will be remediless in the premises or will be put to a multiplicity of actions unless the court exercises its equitable jurisdiction and decides whether said objections to the title were good or bad, and whether said title is marketable or unmarketable.

The substance of the prayer for relief is (1) that the marketability of the title be adjudged and that it be adjudged whether the ina-

bility of the assignee to obtain title was without its own fault; (2) that if the title be marketable and the assignee was at fault in rejecting it, the vendor and assignee be decreed to perform and that the latter be adjudged liable to plaintiff for \$9,000, the profit it was to receive, together with interest thereon and its expenses incurred in the examination of the title, and in the event of the failure of the assignee to perform for plaintiff according to its agreement, the plaintiff have judgment against it for the further amount of plaintiff's liability to the vendor; (3) that if the title be unmarketable, the assignment of the contract of sale be canceled and it be decreed that the assignee retransfer and reassign to plaintiff any interest or rights acquired thereunder upon payment by plaintiff of the \$4,000 paid to apply thereon and of the reasonable expenses incurred by the assignee, and that the plaintiff recover of his vendor \$4,000, the amount paid by him under the contract to apply on the purchase price, and the further sum of \$9,000, that being the amount of profit lost by plaintiff on his contract with the Realty Company, and also the costs and expenses incurred by plaintiff and by its assignee in examining and passing upon the title, and that the aggregate of the amounts for which plaintiff demands judgment against the vendor be made a charge and lien upon the property.

The answer of the defendant Cunningham, after admitting most of the material allegations of the complaint and denying those not admitted, sets up as a separate defense, alleging the conclusions of fact, that she duly tendered full performance on her part both to the assignee and later on to plaintiff, which tenders were refused, and she demands a dismissal of the complaint. The answer of the defendant company put in issue certain allegations of the complaint, admitted that the company rejected the title as alleged; alleges that it tendered to plaintiff and to the vendor all money that it was required to tender under the contracts, and set up two counter-claims, in one of which it alleges that it was induced to accept the assignment of the contract by false representations, and in the other it alleged that the title to the premises was unmarketable for the reasons upon the grounds stated in its objections thereto, which have already set forth, for which reason neither the vendor nor vendee was able to carry out the contract, and that the rejection of the title

was justified, and it prayed for judgment dismissing the amended complaint, annulling the assignment of the contract, adjudging that it was justified in rejecting the title and awarding it judgment against the plaintiff for the amount paid on the contract, and damages, besides costs.

Counsel for the plaintiff, in his opening and in the discussion following the motion for a dismissal of the complaint, stated, in substance, that the parcel of land which the vendor agreed to quitclaim and with respect to which the plaintiff claims she represented and warranted that she had an easement of light, air and access, consisted of a triangular piece bounded northerly by the southerly line of One Hundred and Forty-first street about three and one-half feet; bounded easterly by the northwesterly line of Hamilton place and westerly by the former northwesterly line of Bloomingdale road, and terminating southerly about the middle of the block where the easterly and westerly boundary lines intersect. On the motion to dismiss the complaint it was pointed out that the plaintiff, according to the allegations of its complaint, had not made a decision as to whether its vendor or its assignee was at fault, and that, therefore, it had not alleged a cause of action against either. No motion was made to amend the complaint. The learned counsel for the appellant draws attention to the rule that the objection that a suit in equity will not lie and that the plaintiff has an adequate remedy at law, must be taken by answer, which was not done in this case. The dismissal of the complaint, however, does not rest upon the ground that the plaintiff has an adequate remedy at law or that a court of equity has not jurisdiction of the subject-matter of the action. The dismissal was urged and is sought to be sustained upon the ground that, examined in the light that the trial court was called upon to view the complaint when each defendant moved separately for a dismissal upon the ground that it did not state a cause of action, it is found insufficient. The learned counsel for the appellant concedes that if his client had not assigned the contract it would be obliged to take a definite stand and in order to recover back the money paid to the vendor it would be obliged to allege and prove that the title tendered was unmarketable, and if it failed it could not now having rejected the title obtain a specific performance from its vendor, and such seems to be the law based

upon principle and authority (*Steinhardt v. Baker*, 163 N. Y. 411), but he contends that the situation is changed owing to the assignment of the contract and the action taken by the assignee thereof. The assignment of the contract, of course, cannot enlarge the rights of the plaintiff as against its vendor. Since the plaintiff cannot, as against the vendor, owing to its refusal to take title, have a decree for specific performance even though the title be good, it is difficult to discern what relief, if any, may be afforded the plaintiff in this action against the vendor. It could maintain an action against the vendor to cancel the contract and recover back the purchase price and the reasonable expenses of examining the title if it owned the contract and alleged a breach (*Bruner v. Meigs*, 64 N. Y. 506, 515), which, however, it does not. However, if a good cause of action in equity is stated against either defendant, the dismissal of the complaint in favor of both cannot be sustained. No question of improper joinder of parties defendant was presented by the motions upon which the complaint was dismissed, nor could such objection be taken even by demurrer, as it does not concern one defendant if a good cause of action is stated against him; that another defendant has been joined against whom no cause of action is set forth. (*Crosby v. Berger*, 4 Edw. Ch. 210; *New York & New Haven R. R. Co. v. Schuyler*, 17 N. Y. 592; *McIntosh v. Ensign*, 28 id. 169.) It remains, therefore, to be seen whether a cause of action is shown against the defendant company, and if so, whether the vendor is a necessary or proper party thereto. It is quite clear that the plaintiff does not allege whether the title was marketable or not, and it is claimed by the learned counsel for the respondents that the plaintiff does not even allege the essential facts upon which its marketability depends. Under the liberal rule for the construction of pleadings that obtains in this jurisdiction, and which is still more liberal when the question instead of being raised by demurrer is presented by motion to dismiss on the trial (*Sanders v. Soutter*, 126 N. Y. 195; *Kain v. Larkin*, 141 id. 150), I am of opinion that the complaint was sufficient to admit proof upon the trial to show that the facts stated in the objections to the title were true. If this be doubtful, however, on the complaint standing alone, the objection is removed by the answer of the defendant company which specifically avers that the facts stated in the objections

were true and that the title was defective, and prays for an adjudication thereon canceling and annulling the contract, and that it was justified in rejecting the title, and for the relief to which it would be entitled under the contract upon that theory. (*Jacquelin v. Morning Journal Assn.*, 39 App. Div. 515; *Miller v. White*, 4 Hun, 62; *Cohu v. Hussion*, 113 N. Y. 662.) It is further objected that the plaintiff must decide for itself before suing whether the title was good or bad, and that it cannot come into a court of equity in effect for advice as to whether the title was marketable. The learned counsel for the appellant does not contend that his client is entitled to the advice or direction of the court as is a trustee in certain cases, and he disclaims that the action was brought or presented on the theory that the advice of the court is sought upon any ground. His claim is that facts are alleged in the complaint showing that the plaintiff is entitled to some relief, but that the form and nature of the relief depends upon the decision of the court as to whether the title was marketable and properly rejected, or unmarketable and improperly rejected. If the title was marketable, he contends that as against the defendant company his client is entitled to specific performance of the contract as between them at least, even though on account of the refusal of both to take the title, specific performance may not be decreed as against the vendor, and that if the title be not marketable, his client is entitled to have the assignment canceled and the contract reassigned to it by the defendant company, so that it may be in a position to perform if performance be demanded by the vendor and to recover the purchase money paid and the expenses of examining the title in any event.

In either event, therefore, the claims that plaintiff is entitled to equitable relief against the defendant company, but being in doubt as to the law of the marketability of the title which will control the form and nature of the relief, he presents the case in a double aspect without alleging which is right and prays for relief in the alternative, but founded on the same facts and, therefore, not inconsistent, depending only on whether it is held that the title was marketable or unmarketable. This form of pleading in equity prevailed long before the Code and is still sanctioned. (*McCosker v. Brady*, 1 Barb. Ch. 329; *affd., sub nom. Brady v. McCosker*, 1 N. Y. 214;

Belmont v. O'Brien, 12 id. 400; *Lloyd v. Brewster*, 4 Paige, 537; *Colton v. Ross*, 2 id. 396; *Evans v. Burton*, 5 N. Y. St. Repr. 216; *Schiffer v. Lauterbach*, 7 App. Div. 231; *Matter of Patterson*, 79 Hun, 377; *Redmond v. Dana*, 3 Bosw. 615; 1 Dan. Ch. Pr. [6th Am. ed.] 384, 385; *Hardin v. Boyd*, 113 U. S. 756; *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618; *Halsey v. Goddard*, 86 id. 25.) But the alternative relief must be demanded against the same defendant or defendants. (*Clark v. Lord Rivers*, L. R. 5 Eq. Cas. 97.) In many cases, pleadings in equity presenting the case in a double aspect and demanding alternative relief have been sustained where if the plaintiff failed to establish certain facts alleged which would entitle him to equitable relief, he claimed in the alternative other equitable relief upon other facts alleged. (*Connecticut Mut. Life Ins. Co. v. Cornwell*, 72 Hun, 199; *Redmond v. Dana*, *supra*; *Kilgour v. New Orleans Gaslight Co.*, 2 Woods [U. S.], 144; *Bagot v. Easton*, L. R. 6 Ch. Div. 1; *Davies v. Otty*, 2 De G., J. & S. 238; *Caldwell v. King*, 76 Ala. 149; *Fisher v. Moog*, 39 Fed. Rep. 665; *Rockwell v. Morgan*, 13 N. J. Eq. 384.) This court has recently held that a complaint is good which demands alternative relief, even on inconsistent facts, on plaintiff's failure or inability to sustain one theory, in which event he demands relief upon the other theory. (*Hasberg v. Moses*, 81 App. Div. 199, and cases cited.) We agree with the contention of the learned counsel for the respondents that the plaintiff does not show ignorance of material facts specially or peculiarly known to the defendants, which would, under the former equity practice, entitle it to a discovery of the facts (*Lloyd v. Brewster*, *supra*; *Wilkinson v. Dobbie*, 12 Blatchf. [U. S.] 298), even if that form of complaint would in any case be now permissible under our Code of Civil Procedure, which is doubtful, since it is required that the complaint shall state the material facts, and a remedy by an examination of the defendant to enable the plaintiff to frame a complaint has been provided as a substitute for the old bill of discovery. The plaintiff, however, as already stated, claims to have alleged all of the material facts upon which the marketability of the title depends. If, however, the title was marketable and the defendant company was at fault in rejecting it, it may be doubtful whether the plaintiff has a cause of

action against the defendant company in equity for specific performance, since he would only be entitled to a judgment for damages for breach of contract. Upon this theory of the case I doubt whether the plaintiff's vendor could be brought into the action and compelled to litigate in this action her claim for damages or her right, if she should see fit to assert the right, to a specific performance of the contract as against the plaintiff. On the other hand, if the title was not marketable, the plaintiff would be entitled as against the defendant company to a cancellation and reassignment of the contract. The contract contemplated a formal cancellation and reassignment in the event that the assignee should, without its own fault, be unable to obtain title. This, therefore, was the agreement of the parties and it may be essential to the plaintiff's right to recover of the vendor the down payment and expenses of examining the title, for those rights have passed to the defendant company by the assignment, and moreover plaintiff is entitled to be in a position to perform should its vendor assert the marketability of the title and demand performance. It may well be that a court of equity would not take jurisdiction merely to cancel and annul the assignment (*Globe Mutual Life Ins. Co. v. Reals*, 79 N. Y. 202; *Town of Springport v. Teutonia Savings Bank*, 75 id. 397); but here special facts and circumstances exist which render it proper that the defendant company should be compelled to execute and deliver a reassignment of the contract in accordance with the express agreement of the parties and this it has jurisdiction to do. (*McHenry v. Hazard*, 45 N. Y. 580; *Hamilton v. Cummings*, 1 Johns. Ch. 516; *Metropolitan El. R. R. Co. v. Manhattan El. R. R. Co.*, 11 Daly, 373.) The defendant company, in its answer, alleges that it has demanded the amount for which, upon this theory of the case, the plaintiff is liable to it, and that the plaintiff has refused to pay the same. These allegations are denied in the reply. That, however, if true would only indicate that perhaps the plaintiff might have obtained a reassignment without going into court, but does not bar its right, for, under the contract, the plaintiff was under no obligation to make the payment until the defendant company reassigned the contract. The failure of the plaintiff to demand a reassignment of the contract before bringing the action may be a ground for refraining from allowing it costs, but it is not a bar to equitable

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relief. I am of opinion, therefore, that upon the theory of the complaint which is fairly to be inferred from the allegations and which is supported and sustained by the answer of the defendant company, the suit can be maintained in equity against the defendant company for a cancellation and reassignment of the contract. Inasmuch as the vendor in her answer makes no demand for specific performance and her only prayer for relief was for a dismissal of the complaint, I am of opinion that the complaint was properly dismissed as against her for the reason that she was not a necessary party to the action as between the plaintiff and the defendant company upon the only theory upon which I think the complaint can be sustained, and she cannot be compelled in this action to litigate her right to damages against the plaintiff under her contract with it.

It follows, therefore, that the judgment should be affirmed, with costs, as to the respondent Cunningham, and reversed and a new trial ordered, with costs to abide the event as to the defendant company.

PATTERSON, J., concurred.

Judgment affirmed, with costs. Order filed.

EDWIN E. TULLIS, Doing Business under the Name of TULLIS & COMPANY, Respondent, v. SAMUEL H. STONE, Appellant.

First Department, January 11, 1907.

Contract — action on alleged promise of officer of corporation to pay debt of corporation.

The plaintiff had a contract to install a heating plant and a realty company had accepted an order from the owner to make payments to the plaintiff when due. When the work was partly completed, the plaintiff was warned that both the owner and the realty company were insolvent, and thereafter sued the treasurer of the realty company upon an alleged personal promise to pay for the work already done in consideration of the plaintiff's installing a boiler on the premises. Evidence considered and

Held, that a verdict for the plaintiff was against the weight of evidence.

HOUGHTON, J., dissented.

APPEAL by the defendant, Samuel H. Stone, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of January, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of January, 1906, denying the defendant's motion for a new trial made upon the minutes.

Benjamin F. Feiner, for the appellant.

H. Snowden Marshall, for the respondent.

LAUGHLIN, J. :

On the 21st day of February, 1905, the Wolff Construction Company, as owner, entered into an agreement with the plaintiff, as contractor, by which the latter agreed to furnish "all the materials and perform all the work for the erection of the low-pressure steam-heating apparatus to be erected in the six-story apartment house located at northwest Cor. of 97th St. & Madison Avenue, N. Y. City (complete in every respect)." It was further expressly agreed that the owner should provide all masonry required, but that the plaintiff was to assume entire responsibility for the work as shown on the drawings and described in the specifications prepared by the architect, which were made a part of the contract. With respect to the compensation to the contractor for the work and materials, it was provided that the owner should pay \$4,200, subject to additions and deductions as therein provided (not involved on this appeal) and that payments should be made only on certificates of the architect in installments, the first of \$800 to be made "when all risers are erected," and the second of \$600 "on delivery of boiler," and that the payments should be due when the certificates for the same were issued. It was further provided that if at any time there should be evidence of any lien or claim against the contractor for which the owner of the premises might become liable, the owner should have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. The Manados Realty Company, which was making a building loan to the Wolff Construction Company, accepted an order from the latter to make the payments to the plaintiff under his contract. On or prior to the 17th day of March, 1905, the plaintiff claims to

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have erected all of the risers, and prior to that day he had deposited the boiler in the street in front of the premises. The defendant was the treasurer of the Manados Realty Company. On said seventeenth day of March no payment had been made to the plaintiff. He testified that on that day he was informed by Mr. Roach, the president of the Wolff Construction Company, that it was insolvent; that his contract with it was worthless; that its interest in the building was about to be foreclosed; and that the Manados Realty Company was also insolvent; that he called on the defendant and informed him of these facts and stated that in the circumstances he could not deliver the boiler and intended to take it away; that the defendant said to him that if he would put the boiler in the cellar, he would personally make the first two payments, aggregating \$1,400, on plaintiff's contract, and that thereupon plaintiff delivered the boiler in the cellar. The recovery has been had upon the theory of an original promise on the part of the defendant individually to pay the \$1,400, as testified to by the plaintiff. It does not appear that the defendant had any interest in the building or in the contract, except as treasurer of the company making the building loan.

The plaintiff further testified that after he delivered the boiler he demanded payment of the defendant, who requested a certificate of the architect or authority from Mr. Roach, the president of the Wolff Construction Company; that he endeavored to obtain such consent or certificate, but being unable to do so, wrote the defendant on the 21st day of March, 1905, demanding that the defendant fulfill his "verbal contract and guarantee" to make the payment of the \$1,400; that he never obtained a certificate of the architect entitling him to either payment. On cross-examination, the plaintiff was asked to relate again his conversation with the defendant, and in narrating it he did not testify that the defendant agreed to make any payment individually, and he also testified that the defendant wanted him to put in the boiler in accordance with the contract, and that his understanding was that he was to put the boiler in in accordance with his contract with the Wolff Construction Company, and that if he did that, he was to receive \$1,400 when he got the certificate of the architect, and he admitted that he did not put in the boiler in accordance with his contract with the Wolff Construc-

tion Company, which required him to set it on the foundation. He further admitted that he did not submit to the architect for his approval working plans before he commenced the work in the building, as required by his contract, and that he did not submit working plans as to the risers until on the day on which he claims to have had the conversation with the defendant upon which this action is based.

The plaintiff called as witnesses to part of his conversation with the defendant, Mr. Hartwell, a builder, and Mr. Raff, who was superintendent for Mr. Hartwell. Hartwell testified that he called to see the defendant and found him engaged in a conversation with plaintiff; that he heard the defendant say, "When you have done your work you will get your money," to which the plaintiff replied, "Well, it means that I am not going to get my money;" that the witness asked the plaintiff what he wanted, to which the plaintiff replied, "I want my money;" that the witness asked, "How much is there due you," to which the plaintiff replied, "\$800 for risers and \$600 for the boiler," whereupon the witness said, "Well, Mr. Stone, what do you want," to which the defendant replied, "I want that boiler put in," whereupon the witness said, "Well, will you pay for it?" To which the defendant replied, "Yes, I will pay for that boiler, Roach or no Roach, when it is set on the foundations." Raff testified that when he came into the room the plaintiff was asking for the \$800 payment for the risers, which the defendant refused, but said, "Mr. Tullis, if you put that boiler in the building I will make you the payment." The defendant flatly contradicted the testimony of the plaintiff and denied he made any individual promise in the premises. His testimony is to the effect that on the seventeenth day of March the plaintiff called at his office and in the presence of Mr. Roach, the president of the Wolff Construction Company, asked for the "boiler payment," and was informed by defendant that the risers were not right and that the plaintiff had not given the architect the "lay out," to which plaintiff replied that he would fix the risers and would give the architect the "lay out;" that plaintiff said he wanted the \$600 "boiler payment" and defendant answered in substance that if Mr. Roach wanted it advanced, he would pay it; that later on, in the presence of Mr. Hartwell, the plaintiff demanded the \$600 as the "boiler payment,"

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to which defendant replied that he would pay him for the boiler if he put it in, at the same time saying, in substance, that the company could advance the money to the construction company, and that subsequently after the plaintiff delivered the boiler in the cellar and when he was about to advance, with the consent of Mr. Roach, \$600 for the boiler, and on the architect's certificate which he and Roach had induced the architect to give as to the boiler, it was discovered that there was a chattel mortgage of \$585 on it, and the defendant, acting for the company, refused to advance the money until the lien of the mortgage was discharged. Mr. Roach, the president of the Wolff Construction Company, testified in behalf of the defendant with respect to the conversation between the defendant and the plaintiff on the seventeenth day of March, that the bureau of incumbrances would not permit the boiler to remain on the street and that the plaintiff asked defendant if he would waive the question as to the first payment and advance the \$600 as the "boiler payment," to which the defendant replied that he had no objection if the witness was willing and if plaintiff would comply with his contract by putting the boiler on its foundations in accordance with the contract and specifications, which the plaintiff agreed to do; that after the delivery of the boiler in the cellar, he was in the defendant's office when the plaintiff was present, and the defendant was about to write a check to make the \$600 payment, when the plaintiff admitted that there was a chattel mortgage on the boiler which he said he would remove the following morning, whereupon the defendant refused to make the payment. This witness also testified that the plaintiff failed to submit for the approval of the architect working plans, and that in consequence of this failure some of the risers were erected in a manner interfering with the design of the architect in other respects and it became necessary to change them. The architect testified that he refused to issue the certificate for the first payment because the plaintiff failed to comply with the requirements of the specifications and he stated in detail the respects in which the plaintiff failed to perform his contract and said that he repeatedly drew plaintiff's attention to these omissions. The plaintiff was called in rebuttal and denied that the architect refused the certificate upon the grounds stated by him and testified that in November, 1905, he paid the note to secure which the

chattel mortgage was given, but he admitted that the mortgage was on record at the time he asked for the payment and so remained until November, if not later.

The learned trial judge, in denying the motion for a new trial, wrote a memorandum stating that the credence given by the jury to the testimony in support of the plaintiff's theory of the case surprised him, but he denied the motion upon the ground that that was a question for the jury. We are of opinion that the verdict should have been set aside as against the weight of evidence. It is highly improbable that the defendant, who was merely acting as an agent for the Manados Realty Company, would obligate himself personally in the matter. The fair construction of all the testimony, except that of the plaintiff on his direct examination, is that the defendant was speaking for his company. Moreover, it is quite clear that the plaintiff had not earned or become entitled to the first two payments under his contract with the Wolff Construction Company. He concedes this as to the second, at least, and admits that he did not procure the certificate of the architect as to either, but he claims in one part of his testimony that the personal agreement made by the defendant with him was more favorable, and in another part of his testimony admits that under defendant's agreement with him he was not to be entitled to payment for the boiler except upon compliance with his contract with the Wolff Construction Company with respect to installing it. Upon his own testimony it is clear that he did not comply with that contract in two respects, *first*, he did not place the boiler on the foundation; and, *secondly*, there being a chattel mortgage of record against the boiler, and the defendant and his company, through him, having notice thereof before the boiler was attached to the realty, the indebtedness secured by the chattel mortgage constituted a claim or charge upon which the owner might be liable under the contract.

The learned counsel for the plaintiff seeks to sustain the recovery upon the theory that the plaintiff subsequently paid the debt for which the chattel mortgage was security. The difficulty with that theory is that this is an action at law and the plaintiff was only entitled to recover upon a cause of action complete at the time he commenced the action. Moreover, we think the plaintiff did not sustain the burden of proof to establish an original individual

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promise by the defendant to pay either the first or second installment under the contract.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN and SCOTT, JJ., concurred ; HOUGHTON, J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

FREDERICK LANGE and Others, as Executors, etc., of HENRY J. SCHILE, Deceased, Respondents, v. ROMEO H. SCHILE, Appellant.

First Department, January 11, 1907.

Pleading — when complaint against attorney is on contract rather than in conversion — counterclaim for sums due on other contracts.

It appeared that the plaintiff's testator on going abroad had given a sum of money to his attorney to make payments on claims and liens against the testator's property, then in litigation. On the testator's return he left the balance of the money in the defendant's hands without making a demand therefor.

The plaintiffs, as executors, demanded the return of the money by the defendant, and in a complaint alleged that the defendant wrongfully and unlawfully refused to turn over and pay to the plaintiffs the said amount in his hands and "converted the same to his own use."

Held, that the complaint did not set out an action for conversion, but one for money had and received, and that, therefore, the defendant was entitled to set up counterclaims for sums due on other contracts.

APPEAL by the defendant, Romeo H. Schile, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 8th day of January, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 10th day of January, 1906, denying the defendant's motion for a new trial.

Edward W. S. Johnston, for the appellant.

George W. S. Schulz, for the respondents.

LAUGHLIN, J. :

The defendant pleaded two counterclaims *on contract*, one upon a note and another upon a bond, which were proved. These counterclaims exceeded the amount of the plaintiffs' claim. The court subsequently dismissed the counterclaims and struck out the evidence given to sustain them upon the ground that this was an action in *conversion*. The single question presented by the appeal is whether it is an action on contract or in conversion. If the former, the judgment should be affirmed, and if the latter, it must be reversed.

On a former appeal herein to this court (111 App. Div. 613) from an order dismissing defendant's appeal from the taxation of costs upon the entry of this judgment, we, in effect, held that the action was on contract, and upon that theory the taxation of the costs by the clerk was modified by changing the allowance for all proceedings before notice of trial from twenty-five dollars, which the clerk had allowed upon the theory that it was an action in tort, and which is the allowance in such a case, to fifteen dollars, that being the the amount prescribed in actions on contract.

The action is to recover \$3,012.62. The contention that this money was held in trust by the defendant for the plaintiffs and that the former converted it, was made and met upon the former appeal. It appears that the plaintiffs' decedent, on his departure for Europe in June, 1900, delivered the sum of \$4,317.74 to the defendant, who agreed to deposit the same in a trust company and to pay therewith certain claims and liens which had been filed against real property owned by the decedent, then in litigation, in the event that the litigation should be terminated prior to the return of the decedent, the defendant agreeing that upon the return of the decedent, if the litigation had not terminated, or if it had terminated and he had not expended the moneys as authorized, that he would return the amount and such interest as had accrued thereon to the decedent. The plaintiffs alleged that on the return of the decedent, about the 1st day of September, 1900, the defendant still had possession of all the money, and subsequently, at the request of the decedent, paid certain claims owing by the decedent, which reduced the balance in his hands to the sum of \$3,012.62. The plaintiffs' testator did not die until the 12th day of October, 1901, at which time it is alleged the defendant still had said balance of \$3,012.62 in his pos-

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session or under his control. The plaintiffs then allege that after their appointment as executors they demanded the return of the money by the defendant, "but that the said defendant wrongfully and unlawfully refused to turn over and pay to the plaintiffs the said amount in his hands and converted the same to his own use." This is the only allegation relating to conversion. It is not alleged that the decedent ever demanded the return of the money, and the inference from the facts alleged is that after returning from Europe, instead of asking that the money be returned to him as originally agreed, he concluded to let the defendant have the use of it, and the latter from time to time paid and discharged obligations of the decedent. This new situation between the parties continued for more than a year. In these circumstances it is doubtful whether an action for conversion could have been maintained, but in any event it requires something more than the bare allegation that the defendant refused to pay the money over to the executors and converted it, to stamp the action as one in conversion rather than an action for money had and received.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and SCOTT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

FRANK GALM, Appellant, v. JOHN W. SULLIVAN, Respondent.

First Department, January 11, 1907.

Practice—defense arising after service of answer.

A defense arising after the service of the answer can only be interposed by leave of court and should be in the form of a supplemental answer. Such defense cannot be set up by an amendment as of course.

APPEAL by the plaintiff, Frank Galm, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of September, 1906, denying the plaintiff's motion to strike out

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a so-called "amended answer" on the ground that a part thereof is irrelevant and constitutes matter only permissible in a supplemental answer.

Charles La Rue, for the appellant.

De Witt Bailey, for the respondent.

LAUGHLIN, J. :

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. After the defendant answered and noticed the case for trial, and placed it upon the calendar, the plaintiff settled his claim with the defendant and executed a release of his cause of action. The defendant thereafter and within the time within which he was authorized to amend his answer as of course, and without leave of the court, served an alleged amended answer, setting up the release as a defense. It is manifest that this defense, arising after the original answer was served, could only be interposed by leave of the court and in the form of a supplemental answer. (Code Civ. Proc. § 544.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

JOHN FOSTER NEVIUS, Appellant, v. PETER I. NEVIUS and Others,
Respondents.

First Department, January 11, 1907.

Sale — when parol evidence inadmissible to show that absolute bill of sale was intended to create trust.

A bill of sale, absolute upon its face, which recites that the vendor is indebted to the vendee for a sum of money not named, which he is desirous of paying, and that the assignment is made "to that purpose" cannot be shown by parol evidence to have been intended as an assignment and conveyance in trust to pay such sum as the vendor might be found to owe the vendee.

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Hence, an action for an accounting against the vendee cannot be brought on the theory that the bill of sale was intended as a mortgage, for the action of accounting is not one to redeem the property and is inconsistent with such action.

HOUGHTON, J., dissented, with memorandum.

APPEAL by the plaintiff, John Foster Nevius, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 9th day of May, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint on the opening of the case upon the ground that it fails to state facts sufficient to constitute a cause of action.

John H. Regan, for the appellant.

Herbert S. Barnes, for the respondent Jacobson.

J. Frederic Kernóchan, for the respondent Peter I. Nevius.

Eugene H. Lewis [*John C. Rowe* with him on the brief], for the respondents Church, Julien and Louise K. Nevius.

LAUGHLIN, J. :

This action was placed upon the Special Term calendar, and brought to trial as a suit in equity for an accounting concerning personal and real property assigned and conveyed by the plaintiff to the defendant Peter I. Nevius by an instrument in writing made on the 10th day of December, 1886, and delivered to said defendant pursuant thereto. The instrument assigning and conveying the property is annexed to the complaint and made a part thereof. It recites that the plaintiff is indebted to the firm of Peter I. Nevius & Son, in which name the defendant Peter I. Nevius was doing business, "in a considerable sum of money" which the plaintiff "is desirous of paying." It then provides: "Now, therefore, to that purpose this indenture * * * Witnesseth that the said party of the first part (the plaintiff) for and in consideration of the sum of One Dollar (\$1) to him in hand paid by Peter I. Nevius and another good and valuable consideration thereto rendered by him to the said John Foster Nevius, he thereunto moving, has granted, bargained, sold, assigned, transferred and set over, and by these

presents does grant, bargain, sell, assign, transfer and set over unto the said Peter I. Nevius; all right, title and interest of the party of the first part in and to all benefits and advantages to the said John Foster Nevius, given him as devisee or legatee named in the last will and testament of his father Peter I. Nevius, now deceased, or as devisee or legatee under the last will and testament of his mother, Mathilda Walker Nevius, likewise deceased, and all property real and personal and the rights thereto which might hereafter accrue to said party of the first part by virtue of anything contained in the last will and testament or as heir-at-law of his said father or his said mother; and likewise all beneficial interests of the said party of the first part in and to a certain policy of insurance for ten thousand dollars (\$10,000) on the life of the said Peter I. Nevius, deceased, and which said policy is now held by John Frederick Nevius, as executor of the last will and testament aforesaid. To have and to hold the hereinbefore described property and the whole thereof unto the said Peter I. Nevius and to his heirs, executors, administrators and assigns forever. *In witness whereof* the said John Foster Nevius has hereunto set his hand and seal the year and day first written."

The plaintiff does not allege that there was any fraud or mistake in the reduction of the agreement to writing or that the instrument of assignment and conveyance did not correctly embody the agreement of the parties, and he does not ask for a reformation thereof. He alleges, however, that the instrument was executed as a deed of trust and that the property was delivered in trust to secure the payment of the sums of money then owing by the plaintiff to the firm of Peter I. Nevius & Son; that most of the property has been assigned or transferred by the defendant Peter I. Nevius to the other defendants with full knowledge of the trust; that plaintiff long since demanded an accounting of his rights, interest and property and was informed that his indebtedness to said firm and to the estate of his father more than exceeded the value of the property assigned and conveyed by him to the defendant Peter I. Nevius, as aforesaid, but that he has recently been informed and believes that this information was untrue and was fraudulently given with a view to deceiving the plaintiff and inducing him to refrain from insisting upon an accounting, and that when

he discovered the falsity of these representations, he endeavored to obtain from the defendants an accounting under the instrument assigning and conveying the property to the defendant Peter I. Nevius, which he designates a deed of trust. The prayer for relief is that an accounting be had of the plaintiff's indebtedness to the firm of Peter I. Nevius & Son and to the estate of Peter I. Nevius, deceased, and of all the rights, interest and property assigned and conveyed by the alleged deed of trust, and that if upon such accounting it should be found that there is any sum due and owing from the defendants to the plaintiff, that they be decreed to pay the same, and for such other and further relief as may be just.

The correctness of the decision depends upon a construction of the instrument assigning and conveying the property. The appellant contends that it is susceptible of the construction that the intention was to assign and convey the property in trust to apply the same in payment of his indebtedness to the defendant Peter I. Nevius and to account to him for the surplus, if any.

The respondents claim that the instrument was intended as an absolute assignment and conveyance of the property in satisfaction and extinguishment of the plaintiff's indebtedness to said Peter I. Nevius. The instrument does not recite in express terms that it is executed in full satisfaction of the indebtedness, but reading it as a whole, the inference that that was the intention of the parties is quite manifest. Neither the amount of the indebtedness nor the value of the property assigned and conveyed is stated or estimated. It is recited that the indebtedness is "a considerable sum of money" which the plaintiff "is desirous of paying," and that the assignment and conveyance were made "to that purpose." Literally construed, the instrument means that the plaintiff was desirous of paying all of the indebtedness and that the assignment and conveyance were made to accomplish that purpose. The assignment and conveyance are absolute and there is no suggestion of an accounting or anything to qualify them. Such being the legal effect of the instrument, as we view it, and none of its provisions being ambiguous, parol evidence to show that it was intended as an assignment and conveyance in trust, instead of absolutely, would be contradictory of its terms, and, therefore, inadmissible.

Nor would parol evidence be admissible under the doctrine which

admits such evidence to show that a bill of sale or deed absolute on its face was intended as a mortgage. This is not an action to redeem the property, and that theory would be utterly inconsistent with the complaint which charges that the assignment and conveyance was made in trust to collect, apply and account.

It follows that the judgment should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred;
HOUGHTON, J. (dissented).

HOUGHTON, J. (dissenting):

I dissent on the ground that the complaint is good as to the personality transferred, which might have been in trust without a writing, and hence can be established by parol evidence.

Judgment affirmed, with costs. Order filed.

In the Matter of the Application of WILLIAM RANDOLPH HEARST, Respondent, to JULIUS M. MAYER, Attorney-General of the State of New York, for Leave to Institute an Action in the Nature of Quo Warranto against GEORGE B. McCLELLAN, Appellant.

First Department, January 11, 1907.

Elections — preservation of ballots after time for destruction has expired.

Although section 111 of the Election Law provides for the destruction of ballots after the expiration of six months, yet when new ballot boxes have been acquired and a controversy is pending as to the legality of an election, an order requiring the preservation of the ballots after the expiration of the statutory time will not be vacated, when it does not appear there is any public necessity for the vacating of the order or that the use of the old ballot boxes will be necessary in coming elections.

In any event the application to be relieved from the order preserving the ballots should be made by the board of elections against whom it operates rather than by the officeholder whose election is contested.

APPEAL by George B. McClellan, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 14th day of September, 1906, denying his motion to vacate an order made and

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entered on the 30th day of April, 1906, entitled in this proceeding, and upon stipulation of the Attorney-General, of the attorney for the petitioner, William R. Hearst, and of the corporation counsel, by which it was ordered and directed that the board of elections of the city of New York preserve, until the further order of the court upon notice to William R. Hearst, the ballots cast at the general election held on the 7th day of November, 1905, in the boxes in which the same then were, except those voted on the amendments to the Constitution, together with all unused ballots, stubs, poll books, papers and documents then in the custody of said board relating to said election, and by which it was further ordered and directed that the clerks of the several counties within the city of New York and the superintendent of elections of the metropolitan elections district preserve in their several offices all statements of canvass and other papers and documents and envelopes containing void and protested ballots relating to said election.

Arthur C. Butts, for the appellant.

Clarence J. Shearn, for the respondent.

LAUGHLIN, J. :

The duty of providing ballot boxes for the reception of ballots at any election devolves in the city of Greater New York upon the board of elections,* and to the end that the ballots may be preserved a reasonable time as evidence in a proper action or proceeding and at the same time that the ballot boxes may be available for use at future elections, the Legislature provided in section 111 of the Election Law that after the ballots have been counted and replaced in the boxes as provided by law, "they shall be preserved inviolate for six months" after the election, and may be opened and their contents examined upon the order of the Supreme Court, or a justice thereof, or a county judge of the county, "and at the expiration of such time, the ballots may be disposed of in the discretion of the officer or board having charge of them." It appears that the appellant and respondent were both candidates for the office of mayor of

* See Election Law (Laws of 1896, chap. 909), § 10, as amd. by Laws of 1905, chap. 643 and Laws of 1906, chap. 259.—[REP.

Greater New York at the general election held in the year 1905, and that the appellant received the certificate of election. It was claimed by the respondent that there was fraud or error in the canvass, and he sought to obtain a recount of the ballots, which it was decided was not authorized under the existing law. (*Matter of Hearst*, 110 App. Div. 346; 183 N. Y. 274.) An effort was then made by the respondent to have the Legislature pass a retroactive act, authorizing a recount of the ballots. A bill designed to accomplish this purpose was duly introduced, referred to the appropriate committees of the respective houses of the Legislature and favorably reported, but it failed to pass. About this time an application was made to the Attorney-General for leave to bring an action in the nature of a quo warranto proceeding to try the title to the office of mayor by virtue of said election. This proceeding was pending when the period of six months prescribed by the statute as the time during which the ballot boxes containing the ballots must be preserved by the board of elections was about to expire; and the stipulation upon which the order was entered was doubtless made with a view to preserving the ballots for use as evidence in the event that the application should be granted. The application to the Attorney-General in this proceeding for leave to bring the action was denied in time so that the ballot boxes could have been used at the general election in 1906. Had the *board of elections* then applied to vacate the order to the end that the ballots might be destroyed and the boxes rendered available for use at the impending election, perhaps there would have been no good ground for denying the motion. The board, however, made no application to be relieved from the order. The application was made by the appellant who had no duty to perform with respect to preserving or destroying the ballots, or with respect to furnishing ballot boxes for use at elections. The motion was denied on the 14th day of September, 1906, and the appeal was taken a few days later, but it was not brought to argument until the 21st day of December, 1906, and after the general election of 1906, for which it is conceded other ballot boxes were provided by the board of elections. The order indicates that the court in denying the motion was influenced by the offer of the applicant to provide ballot boxes for the ensuing election at his own expense, because his doing so was made a condition

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of denying the motion. Manifestly this consideration should not have entered into the judicial decision of the motion. If the Legislature made no further provision for the preservation of the ballots and conferred no authority upon the board of elections to provide other ballot boxes, it would seem that the boxes legally provided should have been rendered available for use; and if the purchase of new ballot boxes was authorized, and the court in its discretion saw fit to preserve the ballots longer, that should have been done at the public expense. But now that the general election of 1906 is over, it does not appear that any special election will be held or that the ballot boxes will be needed until the general election of 1907, and it is not claimed that even for that election the ballot boxes used in 1905 will be required, for the reason that a duplicate set has been procured. Although the time within which the board is required by law to preserve the ballots has long since expired, it does not appear that there is any public necessity *at present* for vacating the order requiring that the ballots be preserved.

Two reasons are assigned in behalf of the appellant as grounds for reversal of the order. One is that the application to recount the ballots may be renewed to the coming Legislature, and the other is that the application for leave to bring an action in the nature of quo warranto may be renewed to the newly elected Attorney-General. Without expressing any opinion on the question as to the power or authority of the Legislature to pass a retroactive statute authorizing a recount of the ballots or of the propriety of so doing or of the propriety of an application to the successor of the Attorney-General who denied the application for leave to bring a quo warranto proceeding, or of the authority of such successor to entertain the same, or as to the competency of the ballots as evidence where no action or proceeding has been begun or instituted within the period during which they are required by statute to be preserved, we are of opinion that the court should neither direct nor authorize the destruction of the ballots at the present time. There being no public necessity for the use of the ballot boxes in the immediate future, the ballots which might be competent evidence and essential to a canvass of the votes or to a trial of the title to the office, should either proceeding or action be lawfully and constitutionally authorized, should not be destroyed at a time when the

only ground assigned for so doing is to render futile any action that the Legislature or Attorney-General may attempt to take. In any event, it is manifest that the application to be relieved from the order should have been made by the board of elections against whom it operates, and that board is at liberty at any time and should, when public necessity for the use of the ballot boxes arises, apply to the court to have the order vacated.

It follows that the order should be affirmed, with ten dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Order filed.

EDWARD S. AVERY, Appellant, v. LUCY E. LEE and KATHERINE P. HURLBERT, Respondents.

First Department, January 11, 1907.

Examination of books and papers—defense of Statute of Frauds not considered on such application—inspection of papers in attorney's possession—attorney acting as business agent not privileged.

When in an action for the specific performance of a contract to sell lands, the plaintiff moves for an inspection of papers, a defense of the Statute of Frauds is no bar to the granting of the application if the complaint alleges the contract to convey and the consideration agreed upon. The complaint need not allege that the agreement was in writing, for the Statute of Frauds is an affirmative defense, and the merits of that defense will not be determined on a motion to inspect papers.

When it appears that the alleged contract of sale was made by the defendants' attorney in their absence and that he was acting as their business agent rather than in his professional capacity, the privilege of professional secrecy under section 885 of the Code of Civil Procedure does not obtain.

The privilege does not extend to business transactions to be negotiated by the attorney with a third party, concerning which the client neither requires nor receives professional advice.

If an owner of property employs a counselor at law instead of a real estate agent to negotiate a sale, he does not thereby receive immunity from disclosing the authority conferred upon the attorney.

If the client can be required to disclose the authority, the attorney may also be required to do so, for it is the privilege of the client and not the privilege of the attorney that the statute protects.

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APPEAL by the plaintiff, Edward S. Avery, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of November, 1906, denying the plaintiff's motion for leave to inspect and make a copy of three certain letters and a cablegram, and that the defendants furnish the plaintiff, or deposit with the clerk of the court, the originals of such papers.

Charles P. Northrop [*Arthur Garfield Hays* with him on the brief], for the appellant.

David B. Ogden, for the respondents.

LAUGHLIN, J. :

The action is brought for the specific performance of a contract by which it is alleged the defendants, as owners of premises No. 26 West Thirty-fifth street in the city of New York, agreed to convey the same to the plaintiff for the consideration of \$105,000. The answer contains a general denial and interposes the Statute of Frauds as a defense.

It is contended that the order was properly granted upon the ground that the plaintiff fails to show a valid contract within the Statute of Frauds. The defendants did not demur to the complaint, and it is evident that a demurrer would have been unsuccessful. The complaint alleges ownership in the defendants, and an agreement on their part to convey to the plaintiff the premises therein sufficiently described for a consideration agreed upon and specified. It is not essential to the plaintiff's cause of action that he should allege that the agreement was in writing, because under these allegations he will be at liberty to prove upon the trial a valid agreement within the Statute of Frauds. The Statute of Frauds is a defense which must be specially pleaded, and it need not be negatived by the complaint. The plaintiff was not required to set forth, on an application of this kind, the facts showing his cause of action, and, therefore, the denial of the motion should not be sustained on the theory that it does not appear probable that the plaintiff will succeed upon the trial. We, therefore, pass to the merits of the objection to the granting of this motion, which are that the letters and cablegram are in the possession of one William H. L. Lee, an

attorney and counselor, who received them in his professional capacity as attorney and counselor for these defendants, and is, therefore, privileged from allowing an inspection thereof.

It appears that the defendants at the times in question were in Rome, Italy, where they had been sojourning, if not residing, for many years. They owned other real estate in the city of New York and the person (an attorney at law) who received and has the immediate possession of the letters and cablegram represented them, by power of attorney and otherwise, in negotiating leases of their property and contracting for a sale thereof, and also acted as their legal adviser concerning questions arising with respect to the same. In some instances he collected rents for them, but usually the rents were collected by a firm of brokers and bankers. At this particular time it appears that the only business the attorney was transacting for them or had represented them in transacting for many years, was receiving, passing upon and forwarding offers to purchase this property which was for sale. It does not appear that any question arose with respect to the marketability of the title or otherwise upon which they needed or received his advice. He assumed to be authorized by them to negotiate a sale of the premises and read to plaintiff and his brokers extracts from the letter concerning which an inspection is sought, tending to show such authority. After negotiating the terms of sale with the plaintiff, through his brokers, he wrote the latter that, so far as he had authority to do so, he considered the premises sold to the plaintiff and that he would immediately cable one of the owners for confirmation, and that from a letter recently received he had no doubt that the sale would be approved and that he would immediately communicate the reply received to plaintiff's brokers, and in the meanwhile would inform any one inquiring about the property that it had been sold. Neither the plaintiff nor his brokers had any personal communication with the owners. It is essential to the plaintiff's case that he should show that the attorney was authorized by his constituents to make the agreement for a sale of the premises. The plaintiff is desirous of examining the defendants before trial, with a view to showing, for use upon the trial, that they authorized the attorney to make the contract for a sale of the property. It is manifest that if the order is issued for their examination

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the plaintiff will be met with the objection that the letters at least, if not the cablegram received by the attorney, are the best evidence, and that he may be embarrassed in an endeavor to ascertain the truth by not knowing the contents of the letters and cablegram. Plaintiff, therefore, is desirous of procuring these letters and the cablegram for use upon their examination. The attorney declined to exhibit the letters and cablegram and he has been examined pursuant to the provisions of section 885 of the Code of Civil Procedure for the purpose of using his examination on the motion.

So far as appears by the examination of the attorney and by the motion papers the letter of April 6, 1906, concerning which an inspection is sought and the cablegram of April 27 or 28, 1906, merely related to the authority conferred upon him in negotiating the sale of the premises and the ratification of his acts, except that the letter contained "some kindly and polite message." The attorney, however, declined to permit an inspection of the letter and cablegram or to allow them to be made part of the record of his examination. In these circumstances we think the attorney is not justified on the ground of privilege in refusing to permit the inspection and to deliver the letter and cablegram. The attorney was not acting in his professional capacity but merely as an attorney in fact, virtually the same as a real estate broker in negotiating the sale of the property. The privilege extends to "all communications made by a client to his counsel for the purposes of professional advice or assistance, * * * whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid" (*Britton v. Lorenz*, 45 N. Y. 51), and "to communications in reference to all matters which are the proper subject of professional employment" (*Root v. Wright*, 84 N. Y. 72); but I think it does not extend to business transactions of this nature to be negotiated with a third party, concerning which the client neither requires nor receives advice. (*Rochester City Bank v. Suydam*, 5 How. Pr. 254; *Mowell v. Van Buren*, 77 Hun, 574; *Martin v. Platt*, 51 Hun, 429; 4 N. Y. Supp. 359; *Rosseau v. Bleau*, 131 N. Y. 177; *Bartlett v. Bunn*, 56 Hun, 507; *Edison Elec. L. Co. v. U. S. Elec. L. Co.*, 44 Fed. Rep. 294.) Where an owner of property employs an attorney and counselor at law instead of a real estate agent to negotiate a sale of his property, he does not

thereby receive immunity from disclosing the authority conferred upon the attorney, where this is properly in issue. If the client could be required to disclose the authority, it is manifest that the attorney may be, for it is the privilege of the client, and not the privilege of the attorney, that the law seeks to protect. (*Matter of King v. Ashley*, 96 App. Div. 143; *affd.*, 179 N. Y. 281; *Mitchell's Case*, 12 Abb. Pr. 249; *Jones v. Reilly*, 174 N. Y. 97; *Doheny v. Lacy*, 42 App. Div. 218; *Whiting v. Barney*, 30 N. Y. 330.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion to require the witness William H. L. Lee to permit an inspection of the letter to him from the defendants or one of them under date of April 6, 1906, and the cablegram received by him from the defendants or one of them on the 27th or 28th of April, 1906, concerning the sale of said premises or a ratification thereof and to have the same annexed to his examination, be granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted to extent stated in opinion, with ten dollars costs. Settle order on notice.

JULIA R. FARLEY, Appellant, v. MANHATTAN RAILWAY COMPANY,
Respondent.

First Department, January 25, 1907.

Party — when lessee of elevated railroad may be brought in to defend action for injunction — defendant brought in by supplemental summons.

When a plaintiff sues to enjoin the defendant from operating an elevated railroad and for the damage to the plaintiff's premises caused thereby, and subsequent to the action the defendant leased its road to another company, a motion for leave to serve a supplemental summons bringing in the lessee should not be denied. This is true even though the plaintiff has served summons in another action against the lessee, if it appears that the lessee threatened to construct another track in front of the plaintiff's premises.

Although the lessee is not liable for damages caused by the lessor unless it assume and agree to pay the same, nevertheless when a plaintiff is entitled to injunctive relief against the lessor, the lessee is a necessary party defendant. When such lessee is brought in as a party defendant it should be done by a supplemental summons and complaint.

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APPEAL by the plaintiff, Julia R. Farley, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of January, 1906, denying the plaintiff's motion for leave to serve a supplemental summons adding the Interborough Rapid Transit Company as a party defendant, and to serve the supplemental complaint annexed to the moving papers.

W. G. Peckham, for the appellant.

Sherrill Babcock, for the respondent.

LAUGHLIN, J.:

This action was brought on the 4th day of August, 1902, by the plaintiff as owner of the premises known as No. 829 Third avenue, to perpetually enjoin and restrain the Manhattan Railway Company, which was then in possession of and operating the elevated railroad in Third avenue in front of said premises, from operating the railroad and to compel it to take down and remove the same, and as incidental relief to recover the damages caused thereby. Subsequent to the commencement of the action and on or about the 1st day of April, 1903, the Interborough Rapid Transit Company leased the railroad from the Manhattan Company and has ever since been in possession of and operating the same. The motion was resisted upon three grounds, *first*, laches; *second*, that another action, brought by the plaintiff against the Interborough Rapid Transit Company for the same relief, was pending; and *third*, that the cause of action, if any, against the Interborough Company is separate and distinct from that against its lessor. According to the memorandum opinion of the learned justice who presided at Special Term, it appears that the order was denied upon the second and third grounds. Although the plaintiff was unable to show a stipulation establishing her right to have the lessee brought in as a party defendant in this case, it appears that that course was adopted in many similar cases by stipulation and that the plaintiff was justified in the belief that there would be no serious opposition thereto in this case; and very likely there would not have been but for the decision of the Court of Appeals in *Hindley v. Manhattan R. Co.* (185 N. Y. 335). The complaint in the other action by this plain-

tiff against the Interborough Company had not been served and the inference from the affidavits is that that action was brought on account of a threatened construction of another track in front of plaintiff's premises. The motion, therefore, could not have been properly denied either upon the theory of laches or on account of the pendency of the other action.

Under the decision of the Court of Appeals in *Hindley v. Manhattan R. Co.* (*supra*) a new action for the relief embraced in the original complaint herein might now be barred by the Statute of Limitations. Of course, the lessee is not liable for the damages caused by its lessor, unless it has assumed and agreed to pay them. The original action, however, involved the right of the lessor to maintain and operate the railroad and the structure in the avenue in front of the plaintiff's premises, and in default of its paying the past and future damages of the plaintiff for the injury to her easements of light, air and access, the plaintiff would be entitled to injunctive relief. It is evident that injunctive relief should not be granted after the defendant has parted with possession, without bringing in the lessee as a party defendant, and if the plaintiff could not obtain injunctive relief she might under some of the decisions of the Court of Appeals be relegated to an action at law for her damages and the Statute of Limitations may have run against such an action. It would seem, therefore, that both under the provisions of section 452 and section 723 of the Code of Civil Procedure, the Interborough Company should be brought in as a party defendant. It is manifest that if it be brought in as a party defendant, the proper procedure is to allow the plaintiff to serve a supplemental summons and complaint.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

O'BRIEN, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

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JAMES R. HASKELL, Respondent, v. LENA M. MORAN, as Administratrix, etc., of JOHN B. MORAN, Deceased, Appellant.

First Department, January 25, 1907.

Pleading — second motion to amend complaint — leave of court necessary — when granted — rule as to renewal of motion.

When a motion to amend a complaint by adding a party defendant has been denied without leave to renew the motion, a second motion brought without leave will be denied.

When, however, it appears that the defendant as administrator of a deceased partner, did not demur to the first complaint because of a failure to join the surviving partner as party defendant, but does demur to an amended complaint on the ground of defect of parties, the court should grant a further amendment bringing in the surviving partner as a defendant.

A decision on a motion is not *res adjudicata* to the same extent as a judgment.

Except in cases of provisional remedies, where special provisions of the Code of Civil Procedure authorize a motion to vacate on the moving papers and a subsequent motion for the same relief on new affidavits showing facts previously existing, a motion once made on notice and denied may not be renewed either on the same papers or upon additional facts existing at the time the prior motion was made, without leave of court. But a motion based upon facts subsequently arising or upon the ground that the former order was obtained by fraud or collusion may be made as a matter of right without leave of court.

APPEAL by the defendant, Lena M. Moran, as administratrix, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of November, 1906, granting leave to the plaintiff to amend the summons and amended complaint by adding thereto the name of Ross F. Robertson as a party defendant.

Edwin F. Stern, for the appellant.

Frank L. Crocker, for the respondent.

LAUGHLIN, J. :

The action is brought to recover for goods sold and delivered the copartnership firm of Ross F. Robertson & Co., composed of defendant's intestate and said Robertson.

The action was commenced on the 21st day of May, 1906, and Robertson was not joined as a party defendant. The defendant

answered; and after issue joined, the plaintiff moved for leave to serve an amended summons and complaint bringing in Robertson as party defendant. The motion was denied and the order denying it was entered on the 11th day of October, 1906, which did not give leave to renew. Thereafter the plaintiff, pursuant to an order made on his application and on payment of twenty-five dollars costs, served an amended complaint, which differed from the original complaint only in that it amplified the allegations with respect to the insolvency of said Robertson. The defendant then, instead of answering the amended complaint as before, demurred thereto upon the ground of a defect of parties, in that said Robertson was not joined. The plaintiff thereupon made the motion which resulted in the order from which the appeal was taken.

The learned counsel for the appellant contends at the outset that the order should be reversed upon the ground either that the court was without jurisdiction to make it or that it was improperly granted, leave to renew the motion not having been obtained. A decision on a motion is not *res adjudicata* to the same extent as a judgment. (*Belmont v. Erie Railway Co.*, 52 Barb. 637; *Cruikshank v. Cruikshank*, 30 App. Div. 381; *Riggs v. Pursell*, 74 N. Y. 370.) Although there is jurisdiction, it does not follow that the court may vacate an order previously granted by a court of concurrent jurisdiction. The rule has long been established and is essential to the administration of justice that, except in cases of provisional remedies, where special provisions of the Code of Civil Procedure authorize a motion to vacate on the moving papers and a subsequent motion for the same relief on new affidavits, but of facts previously existing (*Hawkins v. Pakas*, 44 App. Div. 395), a motion once made on notice and denied by the court may not be renewed without leave of the court, either upon the same papers or upon additional facts existing at the time the prior motion was made or upon substantially the same facts. (*Sheehan v. Carvalho*, 12 App. Div. 430; *Mitchell v. Allen*, 12 Wend. 290; *Cazneau v. Bryant*, 4 Abb. Pr. 402; *Hall v. Emmons*, 8 Abb. Pr. [N. S.] 451; *Cruikshank v. Cruikshank*, *supra*; *People ex rel. Platt v. Canvassers*, 74 Hun, 179; *Klumpp v. Gardner*, 44 id. 516.) A motion, however, based upon facts subsequently arising, or upon the ground that the former order was obtained by fraud or collusion, may be made

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as matter of right without leave of the court. (*Burns v. McAdoo*, 113 App. Div. 165; 99 N. Y. Supp. 51; *Wilson v. Barney*, 5 Hun, 257; *Belmont v. Erie Railway Co.*, *supra*; *Corbin v. Casina Land Co.*, 26 App. Div. 408; *Bank of Havana v. Moore*, 5 Hun, 624; *Veeder v. Baker*, 83 N. Y. 156; *Noonan v. N. Y., L. E., & W. R. Co.*, 68 Hun, 387.)

This case does not fall within the rule that where a motion has been denied another for the same relief may be made without leave of the court if it is based on facts arising subsequently. The facts upon which the right to amend must rest existed at the time the former motion was made. The plaintiff might and should have joined Robertson originally. In not doing so he took the risk of defeat by inviting the objection that there was a defect of parties defendant. The only material facts which have arisen since the denial of the former motion are that there an answer had been interposed whereby defendant lost his right to object to the defect of parties defendant, and now a demurrer has been served taking that objection. Those facts would not justify the court in granting the motion. The plaintiff, presumably, voluntarily and unnecessarily incurred that risk. The excuses for his failure to join Robertson originally, and for his apparent laches, were the essential facts to be established. The propriety of joining him is manifest. At the time the original motion was made the defendant had answered and was thereby precluded from raising the objection that there was a defect of parties defendant. It may be, therefore, that this was the ground on which the motion was denied, or it may be that it was owing to the plaintiff's failure to satisfy the court that his omission to sue Robertson originally was excusable. By the interposition of the demurrer it has now become quite important to the plaintiff to join Robertson, but that fact I apprehend, standing alone, would not warrant the court in allowing an amendment at this time. When plaintiff brought his action without joining Robertson he took chances on a demurrer being interposed. The serious consequence in view of the demurrer that will follow his failure to obtain leave to join Robertson now will, of course, be taken into consideration by the court in passing upon the facts presented, tending to excuse his failure to join Robertson originally, but would not alone constitute an excuse therefor. The interpo-

sition of the demurrer renders it quite important to the plaintiff that the relief which was denied originally should be granted now, and affords good ground for an application for leave to renew the motion. (*Talcott v. Burnstine*, 13 N. Y. St. Repr. 552.) I am, therefore, of opinion that the second motion was made on substantially the same facts as those existing when the former motion was made and denied, and that, therefore, leave of the court should have been obtained. I am also of opinion that the order was erroneously granted upon another ground. The excuse offered for not having joined Robertson originally is that when the action was commenced the plaintiff could not locate Robertson and did not know whether he was alive or dead, and that he subsequently ascertained the address of Robertson in one of the western States. The affidavit is made by the attorney. No affidavit of the client is presented, nor is it shown that it could not have been readily obtained. It is manifest that the attorney was not in a position to make an affidavit as to what his client knew with respect to whether Robertson was alive or dead, or where he was at the time the action was commenced. On principle, therefore, the case falls within the rule that where a motion is made to amend a pleading the affidavit of the client must be presented excusing the omission to have the pleadings framed properly in the first instance. (*Mutual Loan Assn. v. Lesser*, No. 1, 81 App. Div. 138; *Ryan v. Duffy*, 54 id. 199; *Treadwell v. Clark*, 45 Misc. Rep. 268.)

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, but with leave to apply to the Special Term for leave to renew the former motion which was denied.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, with leave to apply to Special Term as stated in opinion. Order filed.

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HUGH H. MAWHINNEY, Who Sues on Behalf of Himself and on Behalf of All Other Persons Who Are Depositors under the Reorganization Agreement, etc., Respondent, v. CORNELIUS N. BLISS and Others, Defendants, Impleaded with EDMUND C. CONVERSE, Appellant.

First Department, January 25, 1907.

Corporation — action to compel reorganization committee to account — pleading — when complaint states cause of action — allegations showing fraud.

The plaintiff, as a stockholder, sued the members of the reorganization committee of his corporation. The complaint set forth the plan for the reorganization of the company, by which the stockholders, creditors and bondholders of the corporation who joined in the plan were to deposit their stock and bonds with a depository, and a reorganization committee was appointed to act as agents and trustees for carrying out the plan of reorganization by forming a new corporation, taking in other companies, to which the property was to be transferred.

The complaint, among other things, alleged that the members of the committee had speculated for their own benefit with the securities deposited, and had issued false statements to the depositors; that they were guilty of negligence and misfeasance; had wasted and misapplied the assets of the property acquired by them, and had depreciated the value of the stock deposited, etc.; had caused the insolvency of the corporation and had refused to inform the stockholder of the amount of obligations and expenses incurred by them under the reorganization agreement, etc.

On demurrer to the complaint as not stating a cause of action,

Held, that a fiduciary relation existed between the depositors and the members of the reorganization committee, and that, without deciding whether the depositors might obtain an accounting at any time without showing a breach of trust, the allegations of the complaint sufficiently alleged bad faith by the committee and stated a cause of action for an accounting;

That a decision sustaining the complaint did not necessarily require that the reorganization plan be stayed or abandoned.

INGRAHAM, J., dissented, with opinion.

APPEAL by the defendant, Edmund C. Converse, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of May, 1906, upon the decision of the court, rendered

after a trial at the New York Special Term, overruling the said defendant's demurrer to the amended complaint.

Francis D. Pollak [*William J. Curtis* with him on the brief],
for the appellant.

Roger Foster and *James A. Allen*, for the respondent.

LAUGHLIN, J. :

This is a representative action for an accounting by the appellant and others, as members of a reorganization committee under a reorganization agreement involving the American Cotton Company and ten subsidiary companies. The ground of the demurrer relied upon and argued in behalf of the appellant at Special Term and here, is that the complaint fails to state facts sufficient to constitute a cause of action. The reorganization agreement is annexed to and made part of the complaint, as is also a plan of reorganization prepared by the reorganization committee and a statement of proposed changes, modifications or departures from such plan of reorganization, likewise prepared by said committee. The reorganization agreement was made on the 16th day of June, 1904. The plan of reorganization prepared by the committee bears date the 19th day of August, 1904, and the statement of proposed changes, modifications or departures therefrom bears date the 25th day of July, 1905. The action was commenced on the 13th day of December, 1905. There were three parties to the reorganization agreement. The parties of the first part consisted of the appellant and the other members of the reorganization committee and were therein designated the "Committee." The Bankers' Trust Company was the party of the second part and was designated the "Depository." The parties of the third part consisted of such holders and owners of debenture bonds, notes and other obligations, and of preferred and common stock of the American Cotton Company and of certificates of deposits therefor issued under a stockholders' agreement made on the 2d day of December, 1901, and such holders and owners of notes and other obligations and of the capital stock of ten specified companies as should become parties thereto by depositing their bonds, notes and other obligations, stock and certificates of deposit thereunder with said depository, where it was provided that

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they should become parties to the agreement, as if they had signed and executed the same, and they were designated the "Depositors."

The plaintiff alleges that he owned sixty-five shares of the capital stock of the American Cotton Company, and that on or about the 15th day of August, 1904, pursuant to an invitation from the reorganization committee, he executed the reorganization agreement and deposited his stock with the depository thereunder, and that a great number of others, falling within the class of those intended to be parties of the third part, did likewise and deposited their respective shares of stock, notes, bonds and other obligations and certificates of deposit with the depository. The plaintiff further alleges that the reorganization committee enlarged their number and substituted the Metropolitan Trust Company as the depository. Authority to do this, however, appears to have been conferred by the reorganization agreement. The plaintiff further alleges that the members of the reorganization committee thereafter took possession of all of the property of the American Cotton Company and of the other ten corporations which consisted, among other things, "of a large number of Letters Patent of the United States and a large number of bales of cotton." The plaintiff then charges that by the use of the securities so deposited with the depository the members of the reorganization committee "in their individual capacity have received and realized large sums of money and property of large value besides that of the American Cotton Company which should have been held and administered by them for this plaintiff and other depositors under said reorganization agreement; but said individual defendants have wasted and squandered a large amount of the said property and money, and have used for unauthorized and unlawful purposes a large portion of the balance of the same," and have pledged some of said certificates of stock and other corporate securities with banks, trust companies and other persons, natural and corporate, and "have thus obtained loans of large sums of money, by the use of which, in speculation in stocks, bonds, cotton and otherwise, the said borrowers have realized large profits which in equity belong to this plaintiff and to other depositors under said agreement;" that under color of the reorganization agreement they have unnecessarily and without authority expended large sums

of money for counsel fees and otherwise in excess of the real value of the services and consideration received, and have "otherwise in a manner to the plaintiff unknown, by negligence and misfeasance, wasted and misapplied the assets of the property which they have thus acquired and have depreciated the value of the certificates of stock and other securities deposited with them as aforesaid to the great damage and loss of this plaintiff and the rest of the said depositors;" that when plaintiff deposited his stock the American Cotton Company was solvent, but subsequently it became insolvent, and, by collusion of the members of the reorganization committee and the depository, a receiver of its property was appointed by a vice-chancellor of New Jersey on the 7th day of September, 1904; that each and every statement contained in the plan of reorganization which was issued to the depositors by the members of the committee on the 19th day of August, 1904, and in the statement of proposed changes, modifications or departures from said plan issued by them to the depositors on the 25th day of July, 1905, was false and untrue; that, before commencing the action, the plaintiff demanded of the members of the reorganization committee that they inform him of the amount of the obligations and expenses that had been incurred by them under the reorganization agreement, and of the amount which they had determined should be his share of said expenses, but that they refused to give the information, and he is wholly ignorant thereof and unable to decide intelligently whether or not to dissent from the plan of reorganization adopted by the committee; that on or about the 9th day of November, 1905, in behalf of himself and of others similarly situated, he caused a demand in writing to be served on the members of the reorganization committee for an accounting for all acts done by them and for all property received by them under the reorganization agreement, or under color thereof, and for all money and other property received by them by means of their connection with the reorganization agreement or with the American Cotton Company "including all profits made by membership in syndicates, and all profits made by the use of loans, which you and which any one of you have obtained from persons and corporations with whom you have deposited funds, which you and which any one of you have obtained the custody of in connection with said reor-

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ganization agreement, including profits made by speculation and dealing in cotton," but that they and each of them have failed to account in any respect. The prayer for relief is, as to the members of the reorganization committee, that they account to the plaintiff and other depositors under the reorganization agreement "for all their acts and for all the acts of each of them under color of said Reorganization Agreement and under color of any modifications therein, and for all profits thus realized by them, and for all acts which they have committed by reason of the said stock certificates, which they have acquired as aforesaid," and, in the usual form, for other and further relief.

It is unnecessary to state in detail the provisions of the reorganization agreement. The purpose of the agreement was to vest the ownership and control of the corporations in the reorganization committee as the agents, attorneys in fact and trustees of the stockholders, bondholders and creditors, with a view to formulating a plan for reorganization, by forming a new corporation to which the property would be transferred and in return for which the depositors would receive a proportionate share of the stock and securities of the new corporation. It was expressly provided in the reorganization agreement that the members of the reorganization committee should not be responsible for defects or errors and that "Neither the Committee nor the Depositary assume any personal responsibility for the execution of such Plan and this Agreement, or any part thereof; the Committee, however, undertake in good faith to endeavor to prepare, adopt and execute the same. No member of the Committee, nor the Depositary, shall be personally liable for any act or omission of any agent or employee selected in good faith, nor for any error of judgment or mistake of law, nor in any case except for his, its or their own individual willful malfeasance or neglect; and no member of the Committee shall in any case be personally liable for the act or omission of any other member of the Depositary, nor shall the Depositary be liable for the acts or defaults of the Committee." The reorganization agreement expressly recognizes that the members of the reorganization committee were to receive, hold and sell or otherwise dispose of the property as trustees for the depositors, and that their obligation to the depositors to whom certificates of deposit were to be and were issued, was a trust

liability. The committee were authorized to sell or pledge the property deposited under the reorganization agreement for the purpose of raising moneys "to provide for the use and operation of the business and properties of any of the said companies, or for the corporate uses of any company formed or adopted pursuant to the plan," and they were authorized to pledge the property "for the payment of any moneys borrowed or agreed to be paid and for the performance of any other obligation incurred under the powers herein conferred." The agreement provided that any depositor who might not agree to the plan of reorganization prepared by the committee might dissent therefrom and withdraw from the reorganization agreement as therein provided, within ten days after notice of the plan of reorganization should be mailed to him as therein provided, and might likewise withdraw, as therein provided, within one week after the final publication of notice of "any intentional change or modification or departure" from the plan of reorganization prepared by the committee "and this agreement." It does not appear that plaintiff's demand for information was made before his time to withdraw expired. No time is fixed in the reorganization agreement within which the committee are required to fully complete their duties, and the only provision thereof with respect to an accounting is that "The accounts of the Committee may be filed with the Depositary or with the Board of Directors of any company which may be organized or adopted under such Plan and this Agreement, within one year from the completion of the reorganization, unless a longer time be granted by the Depositary or by such Board. The accounts, when approved by the Depositary or by such Board of Directors shall be final, binding and conclusive upon all parties having any interest therein; and thereupon the Committee shall be fully discharged of all liability and accountability hereunder."

The learned counsel for the appellant concedes that his client may presently be required to account for fraud or bad faith if any existed; but he contends that in view of the purpose of the reorganization agreement, and the discretion vested in the committee, no accounting should be ordered until the work of the reorganization committee has been completed, or a reasonable time therefor has elapsed, unless fraud or bad faith is shown; and he claims that

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the allegations of the complaint are insufficient to admit evidence of fraud and bad faith. On the proposition that no accounting should be ordered at this time, he cites the cases of *Venner v. Fitzgerald* (91 Fed. Rep. 335); *Van Sicken v. Bartol* (95 id. 793) and *Nichols v. Rogers* (139 Mass. 146), but they are not sufficiently in point to require serious consideration. The *Venner* case was a suit for an injunction to restrain the further consummation of a reorganization agreement for alleged unauthorized acts of the committee in purchasing securities of the old company and distributing the securities of the new. The *Van Sicken* case was a suit to enforce a liability against a reorganization committee for alleged breach of duty and for an accounting of plaintiff's property. The case was tried upon the merits and the court found that the plaintiff failed to show gross negligence or willful malfeasance, for which alone the committee would be liable under the reorganization agreement, but a decree was entered requiring the defendants to pay the amount for which they were found to be accountable to him. In *Nichols v. Rogers* a number of purchasers of a mine entered into an agreement by which they gave one of their number "sole, absolute and untrammelled control" of their interests, and he agreed to use his best skill and judgment to recover the mine or their money. They advanced money to their trustee, who, acting under the trust agreement, purchased undivided parts of the mine and sold certain interests therein. Within three months of the date of the agreement one of the parties requested the trustee to convey to him his interest and to render an account. This was refused and a bill in equity was filed to require the trustee to convey to the plaintiff his interest in the property. There was no allegation of misconduct or breach of the trust in the original bill. The bill was amended by alleging that the defendant "now denies that the plaintiff has any interest" in the property purchased with plaintiff's money "and claims to hold it to his own use, and that the defendant had not in his transaction acted in good faith, but had fraudulently and in bad faith." The court held that the original bill did not aver that a reasonable time had elapsed or that defendant had completed the services or abandoned his efforts under the agreement, or that he had in any respect acted in bad faith, and that the demand for a conveyance of his interest "was not in conformity to the agreement, but was in con-

travention of it." With respect to the amendment the court held that as the acts were not charged to have been done before the bill was filed, they did not afford ground for equitable relief under the practice in that State and further added that the charge of fraud was too general.

The plaintiff relies upon decisions in this jurisdiction, where the rule is uniformly held to be that an action for an accounting against a trustee may be had at any time regardless of imputed fraud or bad faith. (*Slayback v. Raymond*, 93 App. Div. 326, and cases cited; *Hancox v. Wall*, 28 Hun, 214; *Frethey v. Durant*, 24 App. Div. 58; *Jordan v. Underhill*, 91 id. 124; *Spier v. Hyde*, 92 id. 467.) It is quite clear that a fiduciary relation existed between the depositors and the members of the reorganization committee. The confidence of the depositors in the members of the committee, shown by vesting in them broad powers and great discretion, rendered it the duty of the members of the committee to act in the utmost good faith. (*Industrial & General Trust, Ltd., v. Tod*, 180 N. Y. 215.)

It is unnecessary to decide whether the depositors might at any time without showing a breach of trust obtain an accounting. It may well be that until a reasonable time had elapsed to enable the reorganization committee to perform the duties which they assumed, the court would not, in the absence of some allegation showing a breach of the trust or gross negligence or bad faith on the part of the committee, call them to account. In the case at bar, however, it appears that the committee had possession of this property in trust for the purposes of the agreement, for considerably more than a year, and there are allegations of fact which, if true, tend to show that there have been breaches of the trust. The allegations of fraud, waste and mismanagement on the part of the committee are not unsupported by other facts. It is unnecessary, however, to decide whether these allegations, with the other facts averred in connection with them, remove the case from the application of those authorities (See *Wood v. Amory*, 105 N. Y. 278; *Everett v. Everett*, 180 id. 452; *Meyers v. City of New York*, 58 App. Div. 534; *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377; *Gernsheim v. Olcott*, 10 N. Y. Supp. 438) which hold that bare allegations of fraud, waste or mismanagement are mere conclusions of law, but it may be observed that the decision of the court

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in *Biddle Purchasing Co. v. Snyder* (109 App. Div. 679), in which the allegations were quite similar, indicates that they are. The committee had no authority, under the reorganization agreement, to speculate with the securities deposited with them. The allegations of this complaint are sufficient to admit proof of the fact that these trustees speculated with the trust funds. Moreover, a charge is made that they issued false statements to the depositors; and if so, it must have been with a view to influencing their action in deciding whether or not to withdraw from the agreement. These and the other allegations to which attention has been drawn, other allegations coupled with their refusal to give information to the plaintiff, are not consistent with good faith. We are dealing now only with allegations. They may not be true, but they are sufficient in a technical point of view to enable the plaintiff to present his case. If the complaint be sustained, it does not necessarily require that the organization plan be stayed or abandoned. It may be, if the proofs suffice, that the plaintiff will be entitled to an accounting for his share of the profits made by the trustees by an unauthorized use of the securities, and that the reorganization plan will be permitted to be consummated. The quantum of relief to be granted, if any, will depend altogether upon the proof, but is not material to a decision on the demurrer. I am, therefore, of opinion that the complaint states a good cause of action and that the demurrer thereto was properly overruled.

It follows that the interlocutory judgment should be affirmed, with costs.

PATTERSON, P. J., and CLARKE, J., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

It seems to me that the allegations of this complaint are too indefinite and general to justify a court of equity to require an accounting by the defendants at this time. After alleging the appointment of the individual defendants as the reorganization committee under an agreement which is annexed to the complaint and by which this committee is made the attorneys, agents and trustees for each of the depositors of the securities of the company which was to be reorganized and which expressly provided that

"neither the Committee nor the Depositary assume any personal responsibility for the execution of such Plan and this Agreement or any part thereof," and that "no member of the Committee, nor the Depositary, shall be personally liable for any act or omission of any agent or employee selected in good faith, nor for any error of judgment or mistake of law, nor in any case except for his, its or their own individual willful malfeasance or neglect, and no member of the Committee shall in any case be personally liable for the act or omission of any other member of the Depositary, nor shall the Depositary be liable for the acts or defaults of the Committee."

The complaint alleges on information and belief that by the use of the said certificates and corporate securities the said individual defendants in their individual capacity have received and realized large sums of money and property of large value besides that of the American Cotton Company which should have been held and administered by them for this plaintiff and other depositors under said reorganization agreement; but said individual defendants have wasted and squandered a large amount of the said property and money and have used for unauthorized and unlawful purposes a large portion of the balance of the same. Coupled with this allegation the plaintiff alleges that he is wholly ignorant of the amount of money and other property so received and realized by said defendants and of the amount of money and of the other property so received and realized by said defendants and of that which they so wasted and squandered and of that so used by them for unauthorized and unlawful purposes and is ignorant of the purposes for which said defendants have used said moneys and other property and of the manner in which the same was wasted and squandered.

Thus we have a contract signed by the plaintiff under which he appoints the committee his agents and trustees, but expressly agrees that neither member of the committee shall be responsible for any act or omission in any case except for his own individual willful malfeasance or neglect, and that no member of the committee shall in any case be personally liable for the act or omission of any other member of the depositary.

He alleges that the reorganization committee as a whole have wasted and squandered a large amount of property and money, and used for unauthorized and unlawful purposes a large portion of the

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balance of the same, coupled with an allegation that he does not know what property they have received, or what property they have used, or the purpose for which they have used it. To justify the court in calling this committee to account before the reorganization is completed, or the plans of reorganization adopted, it seems to me that there must be a distinct allegation of wrongdoing against an individual for which, under the agreement, he is responsible. There is no allegation that all of the members of the committee joined in such alleged misappropriation of the property and money, and where there are several members of a committee, each of whom is not liable for the acts of the other members of the committee, it seems to me that there must be at least a distinct charge that each individual member of the committee who is made a defendant has been guilty of an act which imposes a liability before a cause of action is alleged. This allegation is that the individuals as a whole have wasted and squandered the property and money, and used a sum for unauthorized and unlawful purposes, coupled with an allegation that the plaintiff does not know what property they received, or what property they wasted and squandered, or the particular methods by which these defendants have used said moneys and other property, and the manner in which the same was wasted and squandered, and is not sufficient to entitle the plaintiff to an accounting from members of the committee who were liable for their individual acts of misfeasance or malfeasance only.

The next allegation is also upon information and belief and is that the individual defendants and some and each of them have also pledged certain of the said certificates of the shares of stock and other corporate securities deposited with them with certain banks, trust companies and other persons, natural and corporate, to the plaintiff unknown, and have thus obtained loans of large sums of money by the use of which, in speculation in stocks, bonds, cotton and otherwise, the said borrowers have realized large profits which, in equity, belong to this plaintiff and to other depositors under said agreement, coupled with the further allegation that further particulars of the matter are to the plaintiff unknown.

It is not alleged here that these defendants have not applied any profits realized from these transactions to the benefit of the depositors or parties to the agreement; or that they claim to have any per-

sonal interest therein; that the speculations were not such as were authorized by the agreement and not carried out for the benefit of the parties to the agreement; nor is it alleged that in consequence of these speculations any money or property was lost; on the contrary, it is alleged that profits were realized, which, so far as appears, were applied for the benefit of the parties to the agreement.

There is then the allegation that the defendants claim to have spent large sums of money for counsel fees and otherwise under color of said reorganization agreement, which are alleged to have been unnecessary. But the particular defendants who have made such expenditures are not stated and no facts are alleged to show that such expenditures were unnecessary, being a mere general allegation of a conclusion of the plaintiff's, although he expressly disclaims knowledge of the particulars in relation to the expenditures.

There is also an allegation that the defendants have in a manner to the plaintiff unknown, by negligence and misfeasance, wasted and misapplied the assets of the property which they have thus acquired and have depreciated the value of the certificates of stock and other securities deposited with them to the great loss of the plaintiff and others. This allegation certainly can sustain no cause of action against anybody.

The allegation that the American Cotton Company became insolvent and a receiver was appointed by a vice-chancellor of the State of New Jersey gives no cause of action.

It is then alleged that the defendants have issued their plan of reorganization provided for by the agreement but that the plaintiff has not accepted that plan.

It thus appears that the object for which this committee was appointed has not yet been accomplished but is at present in process of accomplishment. Assuming that after the completion of the plan any party to the agreement would have the right to call the trustees to account, it was clearly contemplated that the committee should proceed with their work and pending the final completion of the work to entitle a party to the agreement to call on the trustees or agents to account there must be some specific allegation of wrongdoing as against some specific member of the committee, for which, under the agreement, he is liable. Such general allegations on information and belief as are here contained, coupled with an express

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statement that the particulars necessary to entitle a party to such an agreement to any relief are unknown, seem to me entirely insufficient upon which to base an application to a court of equity for judgment.

I am, therefore, of the opinion that this complaint fails to state a cause of action, and that the judgment should be reversed and the demurrer sustained.

Judgment affirmed, with costs.

NATIONAL GUM AND MICA COMPANY and THE A. WILHELM COMPANY, Respondents, v. CENTURY PAINT AND WALL PAPER COMPANY and WILLIAM A. MACCORMACK, Appellants, Impleaded with DARS A. DENSMORE and N. CHARLES BARRON, as Administrator, etc., of ERNEST R. BARRON, Deceased, Defendants.

First Department, January 25, 1907.

Pleading — amendment of answer to ask reformation of contract.

When in an action there is a dispute as to the meaning of a contract involved, the defendant should be allowed to amend the answer so as to ask a reformation of the contract conforming it to the intention of the parties.

When the effect of the granting of such amendment will be to take the case from the calendar and delay the trial, the amendment should be conditioned upon the payment of all costs to date.

APPEAL by the defendants, the Century Paint and Wall Paper Company, and another, from an order of the Supreme Court made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of November, 1906, denying the said defendants' motion for leave to serve amended answers.

Henry G. K. Heath [*Claude Gignoux* with him on the brief], for the appellants.

Jerome H. Buck [*Edward A. Alexander* with him on the brief], for the respondents.

LAUGHLIN, J. :

It appears that the appellants at the time the contract was executed objected to its phraseology and asked that it be amended in the particulars in which they now seek to have it reformed, that its

meaning might be clear, but that they were induced to refrain from insisting upon such amendment upon representations made in behalf of the plaintiffs that the contract, as drafted, did clearly express the agreement, as to which there was no dispute and that the proposed amendment was not necessary. The appellants, in their pleading which they seek to amend, admitted the execution of the agreement and that they do not now deny, but they charge that the plaintiffs have taken advantage of the phraseology which the appellants at the time of the execution of the contract deemed ambiguous, and now contend for a construction contrary to the agreement as actually intended by both parties at the time. They claim that the plaintiffs now contend for an erroneous construction, of which, until the recent decision of the Special Term in Kings county in the case of *Kalbach* against them, they did not deem the contract fairly susceptible. They now, however, ask to have the contract reformed to clearly express the agreement which the parties intended to make by the contract as drafted. They are not guilty of laches and they should be afforded an opportunity to establish, if they can, facts which will warrant the court in reforming the contract before they are obliged to comply therewith. It is doubtful whether the contract is susceptible of the construction for which the plaintiffs contend, but in the circumstances the appellants should not be obliged to run the risk of a favorable construction and should be permitted to have their pleadings in such form that they may, if necessary, demand the reformation of the contract. Since, however, the effect of granting the application will be to take the case off the calendar and delay the trial of the issue and to present a new issue, the amendment should only be granted upon payment of all costs of the action to date.

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion granted upon payment of all costs to date.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted on conditions stated in opinion. Settle order on notice.

THE NEW YORK INSTITUTION FOR THE INSTRUCTION OF THE DEAF AND DUMB, Respondent, v. WILLIAM F. CROCKETT, Appellant, Impleaded with MAY LENOX MOTT and Others, Defendants.

First Department, January 25, 1907.

Bankruptcy — partnership — when judgment on partnership debt discharged on bankruptcy of partner — cancellation of judgment.

A judgment on a partnership debt is properly scheduled on the voluntary bankruptcy of a member of the firm.

When on the voluntary bankruptcy of a partner he schedules a judgment against him obtained upon a partnership debt, the judgment creditor, having no other claim against the bankrupt, is presumed to have notice of the proceeding and that the insolvent would seek a discharge from the partnership debt, although it is not expressly scheduled as such.

When a firm is solvent and an individual member is insolvent and seeks a discharge in bankruptcy, he is entitled to a discharge and to have the business of the firm wound up and his surplus interest applied to liquidate his individual debts.

The equity of an individual partner in the partnership assets passes to his trustee in bankruptcy, and although the firm debts are provable against him in bankruptcy, the firm creditors can only share in the individual estate after the individual creditors have been paid in full.

Where a bankruptcy court has acquired jurisdiction and granted a complete discharge of a bankrupt partner without making any reservation as to partnership debts, the decision is *res adjudicata*. It seems, however, that if the discharge be expressly limited to individual debts, the bankrupt is not relieved from liability on firm obligations.

It is not a condition precedent to the discharge of the bankrupt that his estate shall have been completely administered and the accounts of the trustee finally settled.

In any event, on the discharge of an individual partner without reservation he is entitled to have a judgment on the partnership debt canceled of record when it does not appear that the firm is still doing business or has any remaining assets.

It seems, that in such circumstances if it appear that the bankruptcy court has been deceived and that the bankrupt has concealed his property or that a partnership with assets undistributed exists, the application for cancellation of judgment should be denied, for the purpose of enabling the judgment creditor to apply to the bankruptcy court to vacate the discharge.

APPEAL by the defendant, William F. Crockett, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the

14th day of August, 1906, denying the said defendant's motion to have canceled and discharged of record a certain judgment entered in said clerk's office on the 7th day of March, 1901, as to him, pursuant to the provisions of section 1268 of the Code of Civil Procedure, upon the ground that he has been discharged therefrom by a discharge in bankruptcy.

David H. Taylor, for the appellant.

Joseph M. Williams, for the respondent.

LAUGHLIN, J. :

The judgment sought to be discharged is a deficiency judgment obtained in an action to foreclose a mortgage given by the defendant Crockett, the petitioner, and one John S. Roddy. The moving papers show that on the 5th day of August, 1902, more than one year prior to the application for cancellation of the judgment, the petitioner, in voluntary bankruptcy proceedings duly instituted by him in the month of June, 1902, in the United States District Court for the Southern District of New York, where he had resided for more than six months, was duly discharged from all debts and claims which existed against him on the 9th day of June, 1902, and were provable in bankruptcy. The motion was resisted by the plaintiff, and evidently denied, upon the theory that the judgment was on a copartnership obligation of the petitioner and Roddy, who were partners in business; that the business of the copartnership had never been finally settled; that there remained copartnership assets; that there was no application for or adjudication in bankruptcy against the copartnership firm and that a copartnership firm obligation cannot be discharged in bankruptcy instituted voluntarily or involuntarily by or against a single member of the firm.

The correctness of the legal propositions upon which the objections to the cancellation of the judgment are evidently based are neither conceded nor established by any controlling precedent; and the propositions of fact asserted are not sustained by the evidence.

First. The decisions in the Federal courts on some of these questions are conflicting and the decisions in the State courts, while tending toward the doctrine that a discharge in bankruptcy of an

individual who was a member of a firm discharges him from both individual and copartnership debts, are not decisive on facts such as are here presented.

Neither in the petition in bankruptcy nor in the schedules of assets and liabilities is there any reference to a copartnership. That petition showed that the petitioner owed debts which he was unable to pay in full, and that he was willing to surrender all of his property for the benefit of his creditors, except such as was exempt by law, and that he desired to obtain the benefits of the acts of Congress relating to bankruptcy; that Schedule "A," thereto annexed, showed, among other things, a full and true statement of all his debts, the names and places of residence of his creditors, and that Schedule "B" contained an accurate inventory of all his property, both real and personal. Schedule "A" showed three debts, the first to the plaintiff, whose residence is given, and that it is a deficiency judgment for \$1,414.58, after foreclosure of a mortgage; the second is a similar judgment to another creditor for \$1,420.70, and the third is to another creditor for moneys advanced. Schedule "B" showed no property except property of the value of \$30, which was therein claimed to be exempt from the operation of the bankruptcy statute. The order of the District Court, granted on the 5th day of August, 1902, discharging the petitioner, recites that whereas he "has been duly adjudged a bankrupt under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is, therefore, ordered by this Court that said William F. Crockett be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 9th day of June, A. D. 1902, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." The proceedings in bankruptcy, intermediate the filing of the petition and schedules and the order discharging the petitioner, were not presented either in support of or in opposition to the motion. The petitioner, however, showed by affidavit that the plaintiff had notice of the bankruptcy proceedings in accordance with the provisions of section 58 of the Bankruptcy Act of 1898,* which required, among other things, notice of all examinations of the bankrupt and

* 30 U. S. Stat. at Large, 561.—[REP.]

of his application for discharge; and that he did not own any real or personal estate or property at the time of the recovery of the judgment, nor has he since. The plaintiff showed in opposition to the motion, by the affidavit of the widow of Roddy, the other joint debtor in the deficiency judgment, that the defendants were, as she believed and understood, engaged in building operations "for two or or three years as copartners under the name of Roddy and Crockett." She specifies one building operation and says that they conducted some others, but she gives no dates as to when their business commenced or ended. She also says that "she does not know of any property belonging at this time to the debtor, William F. Crockett, or of any money owing to him. That she is not at all acquainted with his affairs." The plaintiff further presented an examination of the petitioner on proceedings supplementary to execution on this judgment on the 26th day of November, 1901. His examination showed that his only business *then* was working for a corporation on a salary; that he had *previously* been in business with Roddy, commencing in 1895 or 1896, as speculative builders, but that the firm had ceased operations and wound up its business on or about the 6th day of October, 1901, and was "no longer in existence;" that the firm books were destroyed by fire on said 6th day of October, 1901; that all the debts of the firm, save this judgment and the other similar judgment scheduled by the petitioner, have been paid; that the firm, in the course of its building operations, purchased the premises upon which from the complaint it appears that the mortgage which was foreclosed was given. The complaint and judgment in foreclosure and deficiency judgment form part of the moving papers. They contain no reference to the firm and show that a bond and the mortgage were executed by the defendants Crockett and Roddy jointly, for the purpose of securing the payment to the plaintiff of the sum of \$28,000, and that Roddy's wife joined in the mortgage. It does not appear therefrom that the mortgage and bond were given to secure an indebtedness of the firm or that the judgment was on a firm liability. It does not appear that the petitioner was indebted to the plaintiff otherwise than on this judgment, and in view of his petition and schedules in bankruptcy and affidavit here presented, it must be assumed that he was not. The judgment was properly scheduled as a debt against

the petitioner, even though recovered on a partnership obligation, because the members of the firm were jointly and severally liable for its debts. I think in the circumstances, since the creditor could not have been misled, that it was not essential that it should have been scheduled as an obligation of the old firm. (*Loomis v. Wallblom*, 13 Am. Bank. Rep. 687. See, also, *West Philadelphia Bank v. Gerry*, 106 N. Y. 467; *Bernheimer v. Rindskopf*, 116 id. 428-440.)

The record does not show whether or not the plaintiff appeared in the bankruptcy proceedings or proved its judgment therein. I regard that, however, as quite immaterial, because by virtue of the provisions of section 39 of the Bankruptcy Act,* it was the duty of the referee in bankruptcy to give the notices required by section 58 of the Bankruptcy Act to be given to creditors, which included all examinations of the bankrupt, all meetings of creditors and the application for discharge.

The United States District Court is a court of record, and on proof of the order discharging the bankrupt the presumption would arise that the court obtained jurisdiction and that its proceedings were had in conformity to law; but we are not required to rest on this presumption, for a certified copy of the order granting the discharge was presented on the motion, and by virtue of the provisions of subdivision f of section 21 of the Bankruptcy Act,† that is declared to be "evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." It must, therefore, be presumed that the plaintiff had notice of the bankruptcy proceedings and that its judgment, since the petitioner was not otherwise indebted to it, was scheduled as one of the debts from which he would seek a discharge. This is not controverted; but the plaintiff says that the judgment, being a partnership obligation, it was entitled to notice as a copartnership creditor that he was seeking a discharge from his copartnership obligations. Support for this contention is found in some of the authorities which, while conceding that a member of a copartnership firm may, on his individual petition in bankruptcy, obtain a discharge from the copart-

* 30 U. S. Stat. at Large, 555.—[REP. † 30 U. S. Stat. at Large, 552.—[REP.

nership, as well as from his individual debts, yet maintain that it is essential to accomplish this result that the firm debts should be scheduled as copartnership obligations, and that the notice to the firm creditors should be notice to them as such, and that the petition in bankruptcy and the application for the discharge should show that the petitioner sought a discharge from firm as well as individual obligations. In most of the cases in which this view is expressed the question as to the effect of a discharge was not before the court for adjudication, and the question before the court arose on an application in the bankruptcy proceedings for a discharge of the bankrupt, to amend by giving notice to his partners, or by proceedings for an adjudication against the firm as an entity. (See *Matter of Little*, 15 Fed. Cas. 598, No. 8390; *Matter of Noonan*, 18 id. 298, No. 10292; *Matter of Laughlin*, 3 Am. Bank. Rep. 1; *Matter of McFaun*, Id. 66; *Matter of Winkens*, 30 Fed. Cas. 302, No. 17875; *Matter of Morrison*, 11 Am. Bank. Rep. 498; *Matter of Freund*, 1 id. 25; *Matter of Meyers*, 3 id. 260; *Matter of Levy*, 2 id. 21.) In *Matter of Levy* (*supra*) doubt is expressed as to whether a discharge of an individual would discharge him from firm debts even though there were no firm assets.

In *Matter of Freund* (*supra*) the opinion of the referee, which was adopted by the United States District Court, Northern District of Iowa, in January, 1899, shows that the question presented for decision was whether the bankrupt had complied with the law and was entitled to a discharge. That was a voluntary proceeding by an individual partner and the only debts scheduled were firm obligations, although they were not scheduled as such. There had been no request to have the firm adjudged bankrupt, and the other members of the firm did not have notice of the proceeding. The application for a discharge was denied upon the ground that the Bankruptcy Act of 1898, as interpreted by the United States Supreme Court in prescribing rule 8 of the General Orders in Bankruptcy, fairly contemplates and requires that if an individual who has been a member of a firm, the affairs of which have not been finally settled, petitions in bankruptcy, he must set forth in his petition the existence of the partnership, and ask to have the other members brought in and apply for a discharge from both classes of debts, by which, I presume, is meant that he must specify in his applica-

tion the two classes of debts from which he seeks a discharge. The decision, which was merely a denial of the application for the discharge until the other partners were brought in, was manifestly sound, because if there were firm assets the interest of the individual member therein, after the payment of firm obligations, would be applicable to the payment of his individual debts, and the liquidation of the partnership business was the only certain way of ascertaining whether there would be a surplus available for the individual creditors. In so far, however, as the opinion in the *Freund* case holds that the present Bankruptcy Act, as interpreted by said rule adopted by the Supreme Court of the United States, prescribes the contents of the petition in bankruptcy or of the application for a discharge, I fail to find any authority therefor. Of course, if the statute prescribed, as thus intimated, that where it was sought to obtain a discharge from partnership obligations the petition must set forth the material facts with respect to the existence of and his interest in the firm, compliance with this requirement would doubtless be jurisdictional, and it might well be that either the discharge would be void if compliance therewith had not been made or it would be ineffective as to firm obligations. The statute contemplates that the proceeding shall originate by petition (§ 3, subd. b; § 4; § 18, subds. a and g),* but it appears to be silent concerning the contents of a voluntary petition at least. Doubtless the jurisdictional facts should be stated. They relate to the existence of probable debts, the residence or domicile of the individual or his principal place of business or the location of property within the jurisdiction of the court (§ 2(1)),† and in the case of a copartnership to the fact that the business has not been finally settled (§ 4a).‡

Rule 8 of the General Orders in Bankruptcy, adopted by the Supreme Court of the United States at the October term, 1898, is as follows: "Any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing

* See 30 U. S. Stat. at Large 546, § 3, subd. b; Id. 547, § 4; Id. 551, § 18, subds. a, g.—[REF.]

† See 30 U. S. Stat. at Large, 545, § 2, subd. 1.—[REF.]

‡ See 30 U. S. Stat. at Large, 547, § 4, subd. a; Id. § 5, subd. a.—[REF.]

of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made." *

It is manifest that this rule has no application to a petition by an individual who is a member of a firm to have himself and not the firm adjudicated a bankrupt. (See Collier's note to *Matter of Freund*, 1 Am. Bank. Rep. 31-33.)

It is evident that an individual may be a member of a solvent firm and at the same time be insolvent himself.

This rule shows quite clearly that the firm cannot be declared insolvent unless it is such in fact. In such circumstances, unless therefore, the individual may by his own petition obtain a discharge in bankruptcy, even though insolvent, he could obtain no relief under the Bankruptcy Act. Where a firm is solvent and an individual member thereof is insolvent and desires to be discharged in bankruptcy, it is manifest that he is entitled to such discharge and that the business of the firm should be wound up and his surplus interest applied in liquidation of his individual debts. This is fairly contemplated and provided for by subdivision h of section 5 of the Bankruptcy Act,† which reads as follows: "In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." (See Collier's note to *Matter of Freund*, *supra*.)

* See Collier Bankr. [5th ed.] 598.—[REP. † 30 U. S. Stat. at Large, 548.—[REP.

There are Federal decisions under the present Bankruptcy Law holding, but without referring specifically to said subdivision h of section 5, as was held under the act of 1867, which did not contain a similar provision,* that the copartnership assets cannot be reached on an individual proceeding in bankruptcy, and that it is essential that the firm should be proceeded against directly. (*Matter of Shepard*, 21 Fed. Cas. 1256, No. 12754.) If by this is meant that they cannot be directly reached, the doctrine is doubtless sound; but the statute clearly contemplates that they shall be reached indirectly by the other members of the firm accounting to the trustee in bankruptcy. It has been held by the Circuit Court of Appeals of the United States (*Matter of Mercur*, 10 Am. Bank. Rep. 505) in the third circuit, on an application to consolidate and amend individual petitions of all members of a firm by asking that the firm be adjudicated a bankrupt, that where each member of a firm individually applies for an adjudication in bankruptcy, the firm assets cannot be administered by the bankruptcy court, but that difficulty may be readily overcome by having the firm adjudged bankrupt. Section 70 of the Bankruptcy Act † provides, among other things, that the title of the bankrupt to any property "which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him," vests in the trustee as of the date of the adjudication in bankruptcy. It is well settled that the interest of an individual member of a firm may be assigned by him, but the assignee only acquires the proportionate share of the member in the surplus remaining after the payment of the copartnership debts and the adjustment of the equities between the members of the firm, and does not acquire any title to the corpus of the firm assets, which remain a primary fund for the payment of the firm debts, with the right in the assignor, as well as in the creditors, to compel their appropriation thereto. (*Saunders v. Reilly*, 105 N. Y. 12, 17; *Menagh v. Whitwell*, 52 id. 146.) The right of firm creditors to have the firm assets applied in payment of their claims is derivative, and is founded upon the rights of the members of the firm as between themselves to have

* See 14 U. S. Stat. at Large, 517, chap. 176, as amended; Collier Bankr. (5th ed.) 911 et seq.—[REP.]

† See 30 U. S. Stat. at Large, 565, § 70, subd. a.—[REP.]

the firm assets first applied in liquidation of firm liabilities. (*Saunders v. Reilly, supra.*) If, therefore, this interest of a member of a firm is assignable by him, it follows, both on principle and by virtue of the express terms of the Bankruptcy Act, that it must pass to his trustee in bankruptcy. I think it may now be regarded the well-settled rule, not only that the equity of an individual in copartnership properly, which is his separate estate, passes to his trustee in bankruptcy, but also that the firm debts are provable against him in bankruptcy, the firm creditors, of course, to share only in the individual estate after the individual creditors have been paid in full (*Amsinck v. Bean*, 89 U. S. [22 Wall.] 395; *West Philadelphia Bank v. Gerry*, 106 N. Y. 467; *Berry Brothers v. Sheehan*, 115 App. Div. 488; *Loomis v. Wallblom*, 94 Minn. 392; 13 Am. Bank. Rep. 687; *Wilkins v. Davis*, 15 Nat. Bank. Reg. 64; 29 Fed. Cas. 1248, No. 17664; *Curtis v. Woodward*, 58 Wis. 499; *Matter of Laughlin, supra*; *Jarecki Mfg. Co. v. McElwaine*, 5 Am. Bank. Rep. 751; *Matter of Webb*, 29 Fed. Cas. 495, No. 17317), and that the bankruptcy of the individual dissolves the firm. (*Wilkins v. Davis, supra*; *Kirby v. Schoonmaker*, 3 Barb. Ch. 49; *Amsinck v. Bean, supra.*) In *Curtis v. Woodward (supra)* the court, in discussing the question as to the property passing to the assignee in bankruptcy under the act of 1867, as amended, say: "The bankrupt thus became divested and stripped of all his estate, property and rights of property, and all actions and rights of action relating to property or rights of property, whether in law or in equity, which by operation of law were thus vested in his assignee in bankruptcy. This complete separation of the bankrupt from his former estate, property, rights of property and of action, seems to render the question relating to the distribution of such estate, and the marshalling of such assets, immaterial to the question of his discharge." It would, therefore, seem clear that an individual member of a firm may, on his own independent application, made in his own right, obtain a discharge, not only from his individual debts, but from his firm liabilities, and that the existence or non-existence of firm assets is immaterial to the decision of this question. This view was expressed by the Supreme Court of Wisconsin in *Curtis v. Woodward (supra)*, but it is opposed by many cases in the Federal District Courts, and some in this district, which appear to be

to the effect that the discharge may be complete or only partial, and that it is complete against all creditors when the firm is adjudged bankrupt or there are no firm assets and the firm debts have been scheduled as such, but partial only and limited to the individual creditors when the individual alone is adjudged bankrupt and especially if there are firm assets. (*Matter of Kaufman*, 14 Am. Bank. Rep. 393; *Matter of Abbe*, 2 Nat. Bank. Reg. 75; *Matter of Knight*, 8 id. 436; *Hudgins v. Lane*, 12 Fed. Cas. 800, No. 6827; *Matter of Feigenbaum*, 7 Am. Bank. Rep. 339; *Crompton v. Conkling*, 6 Fed. Cas. 850, No. 3408; Id. 848, No. 3407; *Trimble v. More*, 47 N. Y. Super. Ct. 340; *Matter of Hirsch*, 3 Am. Bank. Rep. 344; *Dodge v. Kaufman*, 46 Misc. Rep. 248, following *Matter of Meyers*, 3 Am. Bank. Rep. 260.) It is difficult to reconcile this view if it relates to a discharge granted in the general language of the statute, with the plain mandatory language of section 17 of the Bankruptcy Act,* that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts," with certain exceptions not here involved. Since partnership debts are provable against a bankrupt's individual estate, it is difficult to see why they are not discharged by a discharge which follows the language of the statute. It appears to me to be a question of jurisdiction, and that where, as in this case, the bankruptcy court acquired jurisdiction and granted a complete discharge under the statute, without attempting to make any reservation, it should be given effect as such. It may well be that if the adjudication and discharge in bankruptcy are *expressly limited to the individual debts*, the discharge would not relieve the bankrupt from liability on firm obligations, and if that is what is meant by the decisions on that subject, to which reference has been made, they are doubtless sound. Here, however, the discharge is complete, without qualification or limitation, and in the absence of the decree it must be assumed that the discharge is in accordance with the decree. I find nothing in the Bankruptcy Act which requires as a condition precedent to the right of the bankrupt to be discharged, that his estate shall have been completely administered and the accounts of the trustee finally settled. The discharges are sometimes, if not usually, granted before the estate has been completely administered. A discharge in bankruptcy has not been con-

* 30 U. S. Stat. at Large, 550.—[REP.]

strued as a cancellation of the debts which precludes the appropriation of the property in the hands of the trustee to the payment thereof. The discharge is designed to enable the debtor to start anew in the business world without being embarrassed by his former obligations which were provable and dischargeable in bankruptcy. It would seem that the same rule would apply to the appropriation of the partnership assets to the payment of the partnership debts, even after an individual discharge in bankruptcy of a member of the firm, although the partnership assets in such case are not administered directly by the bankruptcy court. The discharge of the indebtedness and cancellation of the judgment could not, I think, deprive the creditor of the right to prove the judgment against the partnership and have the same paid from the partnership assets. Nor would it then, in view of the partnership relation and the rights of the other members of the firm who were not parties to the individual bankruptcy proceeding, become an individual debt, chargeable, in the adjustment of the equities between the partners, to the members other than the one who was discharged in bankruptcy. If, however, this be regarded as doubtful, the difficulty may be obviated by deferring the discharge until after the partnership business has been liquidated by the members of the firm who are not in bankruptcy, and until they have accounted to the trustee in bankruptcy for the interest, if any, of the bankrupt member of the firm, so that all assets, individual and firm, shall have been administered or shall be in the custody of the bankruptcy court. It was doubtless competent for the Supreme Court of the United States, by virtue of the authority conferred by section 16 of the Bankruptcy Act,* to prescribe that a petitioner should state in his petition whether or not he is a member of a copartnership, the business of which has not been finally settled, and, if so, his interest therein, and whether there are firm creditors from whom he seeks a discharge, and firm assets unadministered, which could then be reached under subdivision h of section 5; and doubtless the bankruptcy court could adopt rules on the same subject not inconsistent with those adopted by the Supreme Court. The Supreme Court has prescribed forms for petitions by individuals and for petitions by copartnership firms; but I find no provision

* 30 U. S. Stat. at Large, 550.—[Rep.

in these forms requiring that, in an individual petition, it must be set forth whether the applicant is a member of a copartnership firm, and I find nothing in the rules prescribed by the Supreme Court on the subject, or dealing with the subject, of whether in any circumstances the discharge may be partial and not complete. I am of opinion, therefore, that no question of jurisdiction is presented, and that, at most, a suspicion is cast on the regularity of the petitioner's bankruptcy proceedings according to some of the Federal decisions; but even that depends upon there being a partnership business which has not been finally settled, and on this judgment being a partnership obligation. In these circumstances, I think the true rule is, and that the tendency of the decisions, in the State courts at least, is toward holding that where the court acquires jurisdiction, and grants a full discharge in the language of the statute from all provable debts *properly scheduled*, not specially excepted, that joint as well as individual debts are discharged. (*Curtis v. Woodward, supra*; *West Philadelphia Bank v. Gerry, supra*; *Loomis v. Wallblom, supra*; *Jarecki Mfg. Co. v. McElwaine, supra*; *Wilkins v. Davis, supra*; *Berry Brothers v. Sheehan, supra*.)

Second. I am also of opinion that even though the foregoing rule be unsound, the petitioner was entitled to have the judgment canceled, for it does not satisfactorily appear that this was a firm obligation or that the firm has any remaining assets. It has been seen that the obligation on which the deficiency judgment was recovered was a joint obligation of the petitioner and Roddy, but that alone does not make it a firm debt although the firm property might have been sold thereon, at least if the partners did not object and there was no fraud as against firm creditors. (*Saunders v. Reilly, supra*; *Davis v. President, etc., D. & H. Canal Co., 109 N. Y. 47.*) Under the Federal bankruptcy decisions, which, on this point, appear to be uniform, it would not have been competent even if the firm had gone into bankruptcy, to have shown that the obligation upon which this judgment was recovered was in fact an obligation on which credit was given to the firm, or that the firm had the use or benefit of money borrowed thereon, to thereby make it a firm charge (*Matter of Jones, 8 Am. Bank. Rep. 626*; *Strause v. Hooper, 5 id. 225*; *Collier Bankr. [3d ed.] 72, 73*), nor has it been

shown to be a firm obligation within the liberal rule prescribed in *Berkshire Woolen Co. v. Juillard* (75 N. Y. 535) where the Court of Appeals held in a proceeding in equity that a joint and several obligation of all the members of the firm, shown to have been given in the firm business and for the benefit of the firm, could be proved as a charge against the firm assets in the hands of a receiver of the insolvent firm, the credit having in fact been given to the firm, although the firm was not mentioned in the contract. Even under that rule, it would be essential to show *dehors* the record both that the credit was given to the firm and that the firm had the use of the money, the proceeds of the obligation. (See *Turner v. Jaycox*, 40 N. Y. 470.) The claim that this was a firm obligation is based upon the fact that the firm at one time owned the mortgaged property and that the petitioner answered in the affirmative two leading questions with respect to whether there were any other judgments against the firm, or whether it owed any other debts, but it is manifest that that is wholly insufficient. Moreover, if it were a firm obligation, it does not satisfactorily appear that the firm owns any undistributed assets. This copartnership business was of such a nature that it could have been readily settled and doubtless was practically settled as they parted with each piece of property in which they invested. It might fairly be inferred from the evidence that the firm is not only not in existence, not that its assets have been distributed and a final settlement made between the partners, and if these facts are fairly established, the court would have had no authority to entertain bankruptcy proceedings against the firm. (§ 5a.)* No property was discovered on the plaintiff's examination of the petitioner in supplementary proceedings before his bankruptcy. The plaintiff on subsequently receiving notice of the bankruptcy proceedings, had notice that he still claimed to have no property except two items of the value of thirty dollars, which he claimed to be exempt. The plaintiff had an opportunity in the bankruptcy proceedings to further examine him and to ascertain whether he had any other property than that embraced in his schedules in bankruptcy. (Bankr. Act, †

* See Bankr. Act (30 U. S. Stat. at Large, 547), § 5, subd. a.— [REP.]

† 30 U. S. Stat. at Large, 559.— [REP.]

§ 55, subd. b.) This was a proper subject of inquiry by the bankruptcy court. There perhaps the burden was on the petitioner; but after the discharge, I think it would be on the creditor. (*Loomis v. Wallblom*, *supra*; *Crompton v. Conkling*, 6 Fed. Cas. 850, No. 3408.) It should be presumed on this record in favor of the discharge that if the attention of the bankruptcy court was drawn to this question the court must have decided that there was no firm property to be administered, or the discharge would not have been granted (See *Matter of Meyers*, 2 Am. Bank. Rep. 707); and I do not see how we could examine the proceedings in bankruptcy even if they were before us, to discover whether or not the attention of the bankruptcy court was drawn to the partnership, with a view to impeaching or modifying the apparent effect of the discharge. If it appeared probable that the bankruptcy court had been deceived by the petitioner and that he had concealed his property or concealed the fact of an existing partnership, with assets undistributed, the application for the cancellation of the judgment might well have been denied or held to enable the judgment creditor to apply to the bankruptcy court to open the proceedings or vacate the discharge. The failure of the petitioner to refer to the old partnership which he claimed had been finally settled surely was not jurisdictional even if he had been in error. In any view of this case, therefore, as presented by this record, the petitioner was entitled to have the judgment canceled.

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

INGRAHAM, J., concurred; CLARKE and SCOTT, JJ., concurred in result.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

CHARLES HOFFERBERTH, Respondent, *v.* GEORGE NASH, Appellant.

First Department, January 25, 1907.

Judgment — action to charge joint debtor not served — defense of Statute of Limitations — pleading — amendment at trial.

In an action under section 1937 of the Code of Civil Procedure to charge a joint debtor not personally served in a prior action, a motion to amend the complaint at trial to show that the defendant was not served in the prior action should be granted when it is manifest that the plaintiff attempted to state a cause of action under the section. But a failure of the court to grant such proper amendment does not entitle the defendant to a reversal of judgment for the plaintiff.

Under the former Code of Procedure the proceeding to charge a joint debtor not served was a proceeding in the prior action; but under the provisions of the Code of Civil Procedure it is not a proceeding in the former action, but is a new action. Hence prior decisions that the defendant not served could not plead the Statute of Limitations unless it had run before the original action are not applicable.

The present action is not an action upon the former judgment for the purpose of extending the lien thereof; hence, leave to bring the action is not necessary.

As the present action is a new statutory action, the defendant is entitled to plead the Statute of Limitations as a defense, the period of limitation being ten years, as provided in section 388 of the Code of Civil Procedure. The ten years begin to run from the date the former judgment was recovered.

(Per INGRAHAM, J.): The Statute of Limitations in such action to charge a joint debtor not served in the former action begins to run when the former cause of action accrued; and where the original claim was for goods sold, the statutory action is barred by the elapse of six years.

APPEAL by the defendant, George Nash, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 24th day of April, 1906, affirming a judgment of the City Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 5th day of January, 1906, upon the verdict of a jury rendered by direction of the court; also from an order of the said City Court entered on the 15th day of January, 1906, denying the defendant's motion for the direction of a verdict in his favor, and also (as stated in the notice of appeal) from a judgment entered in the office of the clerk of said City Court on the 10th day of May, 1906, upon said order of affirmance.

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First Department, January, 1907.

Elias B. Goodman, for the appellant.*James A. Allen*, for the respondent.

LAUGHLIN, J. :

The defendant and one George Collins were engaged in business as copartners under the style of "Collins & Nash." On the 4th day of March, 1884, in an action in the City Court of New York, brought by this plaintiff against both Collins and Nash, upon a copartnership liability, but in which the defendant Collins alone was served and the defendant Nash did not appear, the plaintiff recovered a judgment and on the same day a transcript of the judgment was filed and docketed in the office of the clerk of the county of New York. This action was commenced on the 26th day of June, 1902, to charge the defendant pursuant to the provisions of section 1937 of the Code of Civil Procedure, with the amount unpaid on the judgment. The defendant herein pleads, among other things, the Statute of Limitations of ten years and of six years since the recovery of the former judgment, payment and failure to procure an order of the court granting leave to bring the action. The partnership obligation upon which the original recovery was had was an account for lumber sold and delivered to Collins & Nash as copartners. Counsel for the plaintiff, in opening the case, stated that the action was brought on the old judgment, the defendant Nash not having been served, and he introduced the judgment roll and a transcript of the judgment which showed that the defendant Nash had not been served. According to the record the defendant at the close of plaintiff's case moved to dismiss the complaint upon the ground that the complaint did not show that the defendant Nash was served or that Collins was the only party served. It is evident that the word "not" is omitted from the record because the ground of objection, if any, was that the complaint failed to show that Nash was not served and the amendment thereupon asked for shows that such was the objection interposed. Counsel for the plaintiff objected upon the ground that it was too late to move to dismiss upon the pleadings, and the court suggested that the motion was to dismiss for lack of proof, whereupon counsel for plaintiff moved to amend the complaint to conform to the proof showing that the defendant Nash was not served. This motion was denied. It is now urged

that the complaint, owing to this omission, was insufficient to bring the action within sections 1937 and 1938 of the Code of Civil Procedure. It was manifest that the pleader attempted to state a cause of action authorized by those sections, and the omission to allege that the summons was not served on the defendant was not, after the proof was made without objection, fatal to a recovery. The court should have allowed the complaint to be amended in that respect, but its failure to do so does not entitle the defendant to a reversal.

The serious question presented by the appeal is whether the ten-year Statute of Limitations is a bar to the action. The Statute of Limitations had not been pleaded as a defense to the original cause of action. It is not claimed and could not be successfully maintained that the Statute of Limitations has run against the original copartnership liability, for it appears that the summons was served upon the other copartner within six years after the cause of action arose, and by the express terms of section 1939 that is the test of the liability upon the original cause of action of the defendant not served. Section 1939 of the Code of Civil Procedure restricts the defendant in such an action "to defences or counterclaims, which he might have made in the original action, if the summons therein had been served upon him, when it was first served upon a defendant jointly indebted with him; objections to the judgment; and defences or counterclaims, which have arisen since it was rendered."

Sections 1937, 1938 and 1939 of the Code of Civil Procedure are a substitute for section 375 and sections 377 to 381, inclusive, of the former Code of Procedure, which prescribed a proceeding by which the joint debtor not served might be summoned to show cause why he should not be bound by the judgment in the same manner as if he had been originally summoned. The proceedings under the Code of Procedure were held to be *proceedings in the action* at the foot of the judgment and were deemed a continuance of the action against the joint debtor not served, and upon that theory it was held that no Statute of Limitations constituted a bar to the proceeding to charge the joint debtor not served, unless it had run at the time the action was originally commenced; but it was intimated that the proceeding probably could not be maintained after the lapse of a period of time, subse-

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quent to the recovery of the judgment against the joint debtor served, sufficient to give rise to the presumption under the statute that the judgment had been paid. (*Maples v. Mackey*, 89 N. Y. 146; *Gibson v. Van Derzee*, 47 How. Pr. 231; *Broadway Bank v. Luff*, 51 id. 479.) Notwithstanding these provisions of the Code of Procedure, it was held that the plaintiff, who had brought an action against two or more joint debtors, not serving all of them and taken judgment against all, but in form only, as prescribed by the statute, against those not served, was still at liberty to bring another action upon the original cause of action against all of the joint debtors upon the theory that the provisions of the Code of Procedure to which reference has been made gave a cumulative but not an exclusive remedy. (*Prince v. Cujas*, 7 Robt. 76; *Lane v. Salter*, 51 N. Y. 1; *Dean v. Eldridge*, 29 How. Pr. 218.) By such an action it would seem that the plaintiff would be proceeding substantially *de novo* in disregard of the judgment, and that the defendants, other than those served in the former action at least, would be free to interpose the Statute of Limitations regardless of the fact that the original action was timely brought; but that question does not arise for decision in the case at bar, and it is unnecessary to decide whether, in view of the provisions of the Code of Civil Procedure, which have substituted an action for what was formerly a proceeding in the former action, the rule which formerly prevailed, permitting a new action against all of the joint debtors, still obtains. It is manifest that this is not such an action. It is against the defendant not served only, and is based and can be sustained, if at all, only upon the provisions of sections 1937, 1938 and 1939 of the Code of Civil Procedure. If this were to be deemed an action upon a judgment within the provisions of sections 376 and 378 of the Code of Civil Procedure, the object of which would be to restore the lien of the judgment which continued only for ten years, and to extend the life of the judgment, the ten-year Statute of Limitations pleaded would not be a bar, and the only statutory period that would be a bar to the action, as the judgment is or by filing the transcript has become a judgment of a court of record, would be the lapse of twenty years. (See Code Civ. Proc. § 2, subd. 9; Id. §§ 376, 378; *Brush v. Hoar*, 15 N. Y. St. Repr. 859; *Gray v. Seeber*, 53 Hun,

611; 25 N. Y. St. Repr. 641; *McMahon v. Arnold*, 107 App. Div. 132; *Seaman v. Clarke*, 60 id. 416; *affd.*, 170 N. Y. 594.) I am of opinion, however, that it is not an action on the judgment within the meaning of those provisions of the Code of Civil Procedure, and that they relate only to actions to revive the lien of the judgment and extend its life as against parties already *bound thereby*. Nor is it, I think, an action on a judgment within the provisions of section 1913 of the Code of Civil Procedure requiring leave of the court before the action may be brought. It is not strictly speaking an action on the original liability. If it were the defendant might demur on the ground of the non-joinder of his former partner and, but for the statute, he might allege that his liability was discharged by the election of the plaintiff to take judgment against his partner. The plaintiff is not required to plead the facts as he was required to set them forth in the original action. He is merely required to allege that the judgment was recovered on a joint liability, and proof of that fact charges the defendant not served with the amount unpaid on the original judgment, including the costs and disbursements embraced therein. Section 1940 of the Code of Civil Procedure declares that for the purpose of obtaining a provisional remedy, it shall be regarded as an action founded upon the contract upon which the original judgment was recovered, and section 1941, after providing that if the plaintiff recovers the judgment must determine the amount unpaid on the original judgment, declares that costs must be awarded as if the action was brought upon the original contract and the amount remaining unpaid on the judgment had been recovered therein. These provisions shed no light on the question as to the nature of the action for the purpose of determining the applicability of the Statute of Limitations. It is not a cause of action that existed at common law. It appears to be a cause of action under the statute. If the plaintiff fails to show the recovery of the judgment and that it was recovered on a cause of action for which the defendant not served was jointly liable with the defendant served, he fails and his complaint must be dismissed. What the defendant may show as a defense does not affect the nature of the action. The defendant, not having been served and not being personally bound by the former judgment, except to the extent of his interest in the copartnership assets, because he has not

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had his day in court, may of course show that the Statute of Limitations had run at the time the former action was commenced, or that he was not jointly liable with the person served, and either of these facts would constitute a defense; but nevertheless, I think it is in a sense a special statutory action for it could not have been maintained at common law. I am of opinion that the change of remedy from a *proceeding in the action* at the foot of the judgment under the Code of Procedure to a *new action* under the Code of Civil Procedure, works a change in the rule that the Statute of Limitations is not a defense. This action could have been maintained the moment the original judgment was recovered, and it could not have been maintained before. This cause of action, therefore, whether statutory or partly statutory, and partly on the original cause of action or judgment, was not complete, and did not accrue until the recovery of the former judgment. The docketing of the judgment only affects its becoming a lien upon property and is not a condition precedent to bringing an action of this character. (*Whitney v. Townsend*, 67 N. Y. 40.) This is not an action to enforce the judgment, but to establish the personal liability therefor of the joint debtors made defendants but not served, and, therefore, the action may be brought before execution, and even though proceedings on the former judgment are stayed, pending appeal, because the former judgment could only be enforced against the joint property or the individual property of the debtor served. It is immaterial, therefore, to the present inquiry that the clerk in docketing the original judgment, omitted to insert a statement that this defendant was not personally served.

If any Statute of Limitations other than the twenty-year period which would give rise to the presumption of payment of the judgment, is a bar to this action, therefore, it commenced to run from the date of the recovery of the judgment, which was more than ten years prior to the commencement of this action. I am of opinion that the only provision of the Statute of Limitations applicable to this action is section 388 of the Code of Civil Procedure, which limits the commencement of actions not otherwise limited in titles 1 and 2 of chapter 4 of the Code of Civil Procedure to ten

years "after the cause of action accrues." I think that this cause of action accrued the moment the former judgment was recovered. If so, it was barred by the lapse of ten years, and the plea of the ten-year Statute of Limitations was a good defense. The plea of the Statute of Limitations is permitted under the clause of the statute which provides that the defendant may plead a defense or counterclaim which has arisen since the judgment was rendered. The case of *Long v. Stafford* (103 N. Y. 274) is not in conflict with these views, and on the contrary contains an intimation, I think, in accordance with them. There the Statute of Limitations was pleaded as a defense to the original cause of action, and not to the judgment with which it was sought to charge the defendant. The court held that the only bar, if any, would be one to the proceeding to charge the joint debtor not served with the judgment.

We have examined the decision of the Appellate Term in *Kramer v. Schatzkin* (27 Misc. Rep. 206), made by a divided court. There the Statute of Limitations had been pleaded as a defense, not to the judgment, but to the original cause of action. That case was, therefore, correctly decided upon the ground that the Statute of Limitations was not a bar; but with the views expressed in the prevailing opinion that there is no distinction with respect to the application of the Statute of Limitations between the proceeding at the foot of the judgment under the provisions of the Code of Procedure, and the action under the Code of Civil Procedure, I am unable to agree.

It follows that the determination of the Appellate Term and the judgment and order of the City Court should be reversed, and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., and CLARKE, J., concurred.

INGRAHAM, J. (concurring):

I concur with Mr. Justice LAUGHLIN in the reversal of this judgment. I am inclined to think, however, that the Statute of Limitations commenced to run when the cause of action accrued and that the six years' Statute of Limitations applied.

The commencement of the action against the defendant's co-obligor could not in any way affect this judgment against the defendant; he stood in exactly the same relation to the plaintiff as before

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the commencement of that action and the cause of action against him was, I think, barred in this case six years after it accrued.

By section 1933 of the Code of Civil Procedure the judgment in the former action was evidence against the defendant upon whom the summons was served or who appeared in the action only; except that as against the defendant not served such a judgment was evidence to the extent of the plaintiff's demand after the liability of the defendant not served had been established by other evidence. From this it seems clearly to follow that the right to recover is based upon the original cause of action and not in any way upon the judgment against the joint debtor who was served. Now, if it appeared when the new action authorized by section 1937 of the Code of Civil Procedure was commenced that the defendant was not liable upon the original cause of action either because there was no joint liability or because the claim was barred by the Statute of Limitations or for any reason, it seems to me that no cause of action was proved and the action could not be maintained. The fact that the Statute of Limitations was a bar where the statute had run after the entry of judgment in the first action is a defense which arose after the first judgment was rendered, because it was only when the statute had run that it became available as a defense and this defendant would then interpose such defense under section 1939 of the Code of Civil Procedure. As this action was commenced many years after the Statute of Limitations had run against the plaintiff's claim, I think the six years' Statute of Limitations was a good defense, and for that reason the judgment should be reversed.

Determination, judgment and order reversed and new trial ordered, costs to appellant to abide event. Order filed.

ANNA BURKE, as Administratrix, etc., of BENJAMIN F. BURKE,
Deceased, Respondent, v. GEORGE HOLTZMANN, Appellant.

Third Department, January 9, 1907.

Civil service — survival of action for damages under section 20 — failure to seek other employment excused.

An action against a commissioner of public works of a municipality brought under section 20 of the Civil Service Law to recover damages for the refusal of the defendant to allow the preference of a veteran guaranteed by the Constitution and the statute is an action for injury to property rights, survives the death of the plaintiff, and may be continued by his representative.

When in such action it appears that the defendant some time in January promised to give the decedent work upon the city streets after the ice and snow had been removed, the decedent was excused from seeking other similar employment, and his failure to do so does not restrict the verdict to nominal damages, or prevent a recovery.

APPEAL by the defendant, George Holtzmann, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Schenectady on the 14th day of June, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

The defendant was, in 1904, the commissioner of public works in the city of Schenectady. As such commissioner it was a part of his duty to employ laborers upon the street. Benjamin Burke, the plaintiff's intestate, was a resident of the city of Schenectady at that time, and in January, 1904, made application to the defendant for employment as a laborer upon the streets. Before making such application he had furnished the papers required by the municipal civil service commission and had been placed upon their list as eligible to the appointment and had been designated thereon as a veteran. The defendant refused and neglected to give the said Burke employment until the eighth day of August in that year. This action was brought under section 20 of the Civil Service Law (Laws of 1899, chap. 370, as amended by Laws of 1902, chap. 270) to recover damages for his refusal to give to the relator the preference guaranteed to him by the Constitution and the statute. Upon the

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first trial the complaint was dismissed. Upon appeal that judgment was reversed and a new trial was ordered, the opinion of this court appearing in 110 Appellate Division, 564. Upon the second trial the case was submitted to the jury who found in favor of the plaintiff for \$152.25. Upon this verdict judgment was entered and from this judgment and from the order of the court denying the defendant's motion for a new trial defendant has here appealed.

Daniel Naylon, Jr., for the appellant.

Marvin H. Strong and Alvah Fairlee, for the respondent.

SMITH, J. :

The right of Benjamin F. Burke to recover as against the defendant has been determined by us in the appeal from the judgment of dismissal first rendered. We have examined the brief of the learned counsel for the appellant wherein he reargues the questions there decided and we see no reason for changing the decision then made.

Two questions are raised upon this appeal, however, which were not raised upon the former appeal and are not discussed in the opinion then written.

Since the first trial and prior to the second trial Benjamin F. Burke died. By an order of the court his administratrix was substituted in his place. The defendant claims upon this appeal that the cause of action did not survive and that this plaintiff has no cause of action. The action, however, was not one for personal injury. It was for an injury to his property interests. If this were an action for wages under a broken contract of service there would be no question that the cause of action would survive, and yet this is the nature of the action given by the statute and because given by the statute its nature is not altered nor is the claim made the less assignable, which is the test of its survivability. We think the right of survival is determined by decisions in analogous cases. (*Matter of Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145; *Morenus v. Crawford*, 51 Hun, 89; *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192.)

Again it is objected that it appears by the confession of Burke

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himself that he did not seek other employment, which fact would prevent his recovery, or at least authorize a nominal verdict only under the case of *Ruland v. Waukesha Water Co.* (52 App. Div. 280). A sufficient answer to this proposition in this case, however, would seem to be that the plaintiff's intestate, for a part of the time at least, was excused from seeking other similar employment by the promise of defendant's representative to give him employment upon the streets after the ice and snow had been gotten out. It may be that after he was finally refused employment he could not recover if he wholly neglected to seek similar employment elsewhere. But this proposition was not presented to the trial court, and the jury was not asked to be instructed as to the application of this rule after the final declaration that the plaintiff's intestate would not be employed because of the failure to get the recommendation of the alderman of his ward.

We see no other grounds for reversal of the judgment and conclude that the judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs. PARKER, P. J., not sitting.

In the Matter of the Application of WILLIAM D. TYNDALL, Appellant, for the Judicial Settlement of His Account of His Proceedings as General Guardian of ESTON E. DEVORE, an Infant.

JOHN Z. TWICHELL, as General Guardian of ESTON E. DEVORE, Respondent.

Third Department, January 9, 1907.

Attorney and client — action by infant in forma pauperis — when surrogate should not pass on attorney's right to compensation — jurisdiction of Federal court to fix attorney's compensation.

The appellant acted as an attorney for an infant in an action brought to recover damages for injuries received. The action was originally brought in the State court but was transferred to the Federal court, and in both courts the action was brought *in forma pauperis*. The guardian *ad litem* for the infant appointed by the State court entered into a contract with the attorney by which the latter was to receive fifty per cent of the recovery. The attorney

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was subsequently appointed general guardian of the infant and prior to receiving the recovery in the action obtained an *ex parte* order of the surrogate allowing him fifty per cent of any recovery, with costs and disbursements. Having received the recovery, he petitioned for a judicial accounting as general guardian, in which proceeding the infant was not served with citation, but service thereof was admitted by the infant's mother and the special guardian. In that proceeding the surrogate made a decree assuming to settle the guardian's accounts and allowing a payment to himself of the share of the recovery set by the contract with expenses, and another general guardian was appointed for the infant. Subsequently the appellant petitioned for a supplementary accounting on which the infant was not cited and in this proceeding the special guardian objected to the prior allowance of the sum received by the appellant. The surrogate decided that the former decree was invalid and declined to pass upon the attorney's claim.

Held, that as the action was brought *in forma pauperis* the attorney was bound to prosecute without compensation, and that the contract for a contingent fee was unenforceable;

That the former decree purporting to settle the guardian's account and allowing the item of compensation was wholly without jurisdiction for failure to serve citation upon the infant;

That upon the second accounting the former adjudication as to the allowance of compensation was not binding upon the surrogate and that it was proper for him to remit the petitioner to the proper tribunal for the adjustment of his rights;

That under the Federal statutes there is no provision that the attorney for a plaintiff suing *in forma pauperis* shall receive no compensation, and in case of a recovery it is the practice of that court to allow the attorney a *quantum meruit*;

That although the Appellate Division under sections 2586 and 2587 of the Code of Civil Procedure has the same power as the surrogate to decide questions of fact and to receive further testimony and to reverse or modify the surrogate's decree, nevertheless as the court did not have before it the order of the Federal court fixing the amount of the attorney's compensation, the matter should be remitted to the surrogate before whom the determination of the Federal court should be presented.

APPEAL by the petitioner, William D. Tyndall, from a decree of the Surrogate's Court of the county of Sullivan, entered in said Surrogate's Court on the 30th day of December, 1905.

Some time prior to December, 1899, Eston E. Devore, an infant, was injured in a railroad accident. An action was brought in the Supreme Court of this State against the Delaware, Lackawanna and Western Railroad Company by Mary O. Heater, his mother and guardian *ad litem*, to recover his damages sustained in such

accident. The action was transferred to the United States Circuit Court, and after two trials the plaintiff recovered a judgment for \$21,855.80. William D. Tyndall, the appellant in this proceeding, acted as the attorney for this infant and for the guardian *ad litem*. In the State court, before the action was removed to the United States Circuit Court, he procured an order that the action might be brought *in forma pauperis*. After the action was removed to the United States court he procured a similar order in that court, and the action was thus prosecuted to its termination. This judgment was paid to Mr. Tyndall upon June 8, 1903. About a month prior thereto and upon May 12, 1903, the said Tyndall was by the Surrogate's Court of Sullivan county appointed general guardian of the infant who was then under the age of fourteen. After the commencement of the action in the State court the guardian *ad litem* entered into an agreement with the appellant that he should receive as compensation for his services fifty per cent of the recovery. On June 1, 1903, after the said Tyndall had become general guardian, and about a week before the payment of the said moneys, upon petition by said Tyndall, an *ex parte* order was granted by the said surrogate allowing to him the said fifty per cent of any recovery that should be obtained, in addition to all costs and disbursements. About a year thereafter, and in May, 1904, Mr. Tyndall filed in the Surrogate's Court a petition entitled: In the Matter of the Judicial Settlement of the Account of Proceedings of William D. Tyndall, General Guardian of Eston E. Devore, an Infant, in which, after alleging his appointment as general guardian, he averred, following the language of section 2849 of the Code, that he was desirous of rendering an account of all his proceedings as such general guardian, of having the same judicially settled, and of being discharged from his duties and liabilities, and for that purpose he prayed that a citation might issue to the infant and Mrs. Heater, his mother. Upon this petition a citation was issued, dated the twenty-eighth day of May, and returnable at two o'clock in the afternoon of the 13th day of June, 1904. The citation was addressed not only to the infant and Mrs. Heater, but to John D. Lyons, Esq., special guardian for said infant on accounting. The only purpose of the proceeding as stated in the citation was to examine the accounts of William D. Tyndall, general guardian of Eston E. Devore. The

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citation was not served on the infant. Instead of such service was an admission of service upon the mother and the special guardian so appointed. In the proceeding thus begun Mr. Tyndall filed accounts as general guardian in which he charges himself as guardian with the amount of the judgment collected from the Delaware, Lackawanna and Western Railroad Company, amounting, as stated, to \$21,855.80, and credits himself with the payment of \$12,813.80, made to himself as attorney, as the amount of his "fee per order," referring evidently to the earlier *ex parte* order of June 1, 1903. Upon the said date the surrogate made a decree which assumed to settle the guardian's accounts as filed, showing a balance remaining in his hands of only \$8,848.05, directed that out of this amount further payments aggregating \$511.99 be made, and directed the payment of the remainder, to wit, \$8,326.06, to his successor in office. Nothing further was done until January, 1905, when Mr. John Z. Twichell was appointed by the surrogate the guardian of said infant to succeed the appellant Tyndall. Thereafter, and upon March 17, 1905, the appellant Tyndall filed a further petition in which the accounting and decree before mentioned were referred to and the appointment of Mr. Twichell as the successor general guardian averred. In that petition request was made that a citation be issued to all parties named therein, to the end that said Tyndall might render a supplemental account, and upon the passing of the same might turn over the funds, securities, books and papers to his successor in office. The citation was returnable April 17, 1905. This citation, like the earlier one, was addressed not only to the infant and his mother, but to John D. Lyons as "special guardian for said infant on accounting." Upon this accounting a balance was shown by him of \$8,541.57, to be distributed to the ward or paid to Mr. Tyndall's successor in office subject to the expenses of the accounting. Upon this accounting, however, Mr. Lyons, the special guardian, objected to the item of \$12,813.80 received by Mr. Tyndall, and the surrogate decided that the decree and order theretofore made in respect of this item were invalid and declined to pass upon the claim. For these reasons the claim was disallowed and the guardian was charged with the full amount of the moneys under the judgment against the Delaware, Lackawanna and Western Railroad Company, less certain expenses, and by reason of the supposed lack of

jurisdiction the surrogate declined upon the accounting to allow him anything for services in said action but directed that "the matter should be held open for a reasonable time to allow the guardian an opportunity to have his claim adjusted by the proper authority so that he can be credited with the amount awarded to him on turning over the estate to his successor." In the decree made this date was fixed as April 1, 1906, or three months after the making thereof. From this decree Tyndall has appealed, claiming that the surrogate erred in refusing to allow to him the compensation provided for in the agreement with the special guardian and in the decree of June 13, 1904.

Walter K. Barton, for the appellant.

Parsons, Closson & McIlwaine [*William E. Carnochan* of counsel], for the respondent.

SMITH, J.;

The *ex parte* order of June 1, 1903, approving of the contract between the special guardian and Tyndall is ineffective against this infant, who was not a party to the proceeding. Moreover the contract was made while the action was being prosecuted by the plaintiff *in forma pauperis*, and by section 460 of the Code of Civil Procedure Tyndall was bound to prosecute that action without compensation and the contract was, therefore, unenforceable. The decree of June 13, 1904, purporting to settle the accounts of Tyndall and allowing this item as compensation was wholly without jurisdiction for failure to serve the citation upon the infant himself. (*Potter v. Ogden*, 136 N. Y. 384.) Upon the accounting, therefore, which resulted in the decree from which this appeal is taken there was no adjudication binding upon the surrogate as to the allowance of this compensation and he was free to act upon the facts as were then presented to him. In the opinion of the learned surrogate he states that he was without jurisdiction to pass upon this claim, but that the allowance of compensation must be determined by the court in which the action was tried. (48 Misc. Rep. 39.) The decree itself, however, only declined to allow compensation until the same shall be determined by "the proper tribunal." In our view of the case it is unnecessary

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to decide whether or not the surrogate could have assumed jurisdiction to pass upon this claim. He might well, as matter of propriety or discretion, have declined to pass upon it and sent the parties into the United States court for the determination thereof. Upon an appeal from a surrogate's decree this court has the same power to decide the questions of fact that the surrogate had, and may, in its discretion, receive further testimony, and may affirm, reverse or modify the decree or order appealed from as to any and all parties. (Code Civ. Proc. §§ 2586, 2587.) These provisions of the Code have been held to give the Appellate Division upon these appeals the power of the surrogate himself. (*Matter of Rogers*, 10 App. Div. 593; *Matter of Laudy*, 78 Hun, 479; *Matter of Drake*, 45 App. Div. 206; 60 N. Y. Supp. 1023.) If, in our judgment, the decree appealed from be a proper one, we may affirm it, although based upon an erroneous conception either of the facts or of the law. While under the United States statutes there is no provision as is found in our statutes that in an action brought by a plaintiff *in forma pauperis* the attorney shall receive no compensation, nevertheless, the right of an attorney to receive compensation is held by the United States courts to be under the control and guidance of that court, which, notwithstanding an agreement for specific compensation, will, nevertheless, determine the compensation to be allowed the attorney as upon a *quantum meruit*. In *Whelan v. Manhattan R. Co.* (86 Fed. Rep. 219, 220) the rule is thus stated by Judge LACOMBE: "Once it is shown to the court that there is a cause of action 'worthy of a trial,' which plaintiff, a citizen of the United States, cannot prosecute without incurring indebtedness, which such citizen is too poor to pay, then Congress prepares a way whereby such poor citizen may have his day in court without incurring such indebtedness. Not only is he to be relieved from securing the costs of his adversary, but an attorney is to be provided for him by the court, who will prosecute his cause of action without stipulating for some compensation in the event of success larger than the *quantum meruit*. In other words, the 'poor citizen' will not be compelled, by reason of his poverty, to enter into any contract more oppressive than such as could be made by his more fortunate fellow-citizen. The attorney assigned by the court, in the event of non-success, will, of course, receive nothing; in the event of final success, he may

apply to the court for an order fixing a fair compensation for the services he may actually render, which will be paid to him out of the fund recovered, and the balance only paid over to plaintiff.

"If the attorney who brought the action is willing to continue the litigation on those terms, he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her case."

We are of opinion that the decree made was an eminently proper one and should stand.

Counsel both for the appellant and respondent stated upon the argument that since the making of this decree application had been made in the United States court for a determination of the amount of compensation which should be paid to this attorney; that a hearing was had before a master who determined that the appellant should have one-third of the recovery in addition to certain allowances for expenses. This report of the master was confirmed by the court, after allowing to the attorney an additional sum for expenses. If these facts had been put before us formally, we might here perfect the decree without sending the matter back to the surrogate. Without the figures stipulated before us, we must send the matter back to the surrogate, before whom the determination of the United States court can be presented. The time within which the appellant was authorized by the decree to present the order of the United States court was fixed as April 1, 1906. That time should be extended to March 1, 1907, and the decree so modified, and as modified affirmed, with costs.

All concurred; PARKER, P. J., not sitting.

Decree modified as per opinion, and as modified affirmed, with costs.

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In the Matter of the Appointment of JOHN Z. TWICHELL, as Guardian of the Person and Estate of ESTON E. DEVORE, an Infant, Respondent.

WILLIAM D. TYNDALL, as General Guardian of ESTON E. DEVORE, an Infant, Appellant.

Third Department, January 9, 1907.

Guardian — application by former guardian to remove successor — application refused when interest of infant not involved.

When an attorney, who is also general guardian of an infant, has petitioned for a judicial settlement of his accounts and for the appointment of a successor and the latter has been appointed, an application to remove the new guardian should not be granted when it appears that it is made by the former guardian solely because the second guardian contested his right to compensation as attorney, and the proceeding is not brought in the interest of the infant.

APPEAL by William D. Tyndall, as general guardian of Eston E. Devore, an infant, from an order of the Surrogate's Court of the county of Sullivan, entered in said Surrogate's Court on the 30th day of December, 1905, denying his motion for the revocation of letters of guardianship theretofore issued to John Z. Twichell.

Walter K. Barton, for the appellant.

Parsons, Closson & McIlvaine [*William E. Carnochan* of counsel], for the respondent.

SMITH, J.:

In an opinion in *Matter of Tyndall* (117 App. Div. 294), the decision of which is handed down concurrently with the decision in this case, the facts are substantially stated as to the manner in which the respondent was appointed as general guardian. The application for his removal by the appellant was made upon various grounds. The application is not brought in the method provided by sections 2832 and 2833 of the Code of Civil Procedure and moreover it does not seem to be made in behalf of the infant. After the decree appointing Twichell as guardian this appellant petitioned for a settlement of his accounts as general guardian, alleging the due appointment of Twichell as his successor and cited him to attend the settlement of

his accounts and asking leave to turn over to his successor the securities and amounts due the estate. In the petition for the accounting of June thirteenth he had requested a settlement of his accounts and that he be allowed to resign and that a successor be appointed. It is only after the present guardian had refused to recognize his claim for compensation and was successfully contesting the same that this application was made, as appears clearly, not in the interest of the infant but in his own interest, that he may delay passing over the moneys which are found due from him to the estate. For these reasons the surrogate was authorized to deny his motion, and the order should be affirmed, with ten dollars costs and disbursements.

All concurred; PARKER, P. J., not sitting.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of the Application for the Commitment of SARAH A. C. MURTAUGH, an Alleged Insane Person, Appellant, to the Hudson River State Hospital at Poughkeepsie, N. Y.

RICHARD W. MURTAUGH, Petitioner, Respondent.

Third Department, January 9, 1907.

Incompetent person — application for commitment under chapter 545 of the Laws of 1896 — unsuccessful petitioner not liable for costs — decree corrected by motion.

An application for the commitment of an insane person to the State hospital brought under chapter 545 of the Laws of 1896, as amended, is not a special proceeding as defined by section 3334 of the Code of Civil Procedure. The application is *sui generis* and not governed by the general provisions of the Code of Civil Procedure relating to special proceedings.

As by the amendment to section 64 of said act made by chapter 428 of the Laws of 1904, the provisions for awarding costs against an unsuccessful petitioner were stricken from the statute, an unsuccessful petitioner is entitled to be relieved from a decree charging him with costs.

A petitioner erroneously charged with costs in such proceeding is not required to appeal, but may move before the surrogate for a correction of the decree.

APPEAL by Sarah A. C. Murtaugh from an order of the Surrogate's Court of the county of Albany, entered in said Surrogate's

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Court on the 31st day of July, 1906, striking out from a decree theretofore entered in said court the provision directing the petitioner, Richard W. Murtaugh, to pay costs to the said Sarah A. C. Murtaugh.

Ransom H. Gillet, for the appellant.

John H. Gleason, for the respondent.

SMITH, J.:

This was an application made upon the petition of Richard W. Murtaugh for an order to commit his wife, this respondent, Sarah A. C. Murtaugh, to a hospital for the insane. The petition was accompanied by the certificate of two licensed examiners in lunacy, as prescribed by the statute. Upon the hearing before the surrogate the petition was dismissed, and in the decree dismissing the petition costs were charged against the said Richard W. Murtaugh in the sum of \$111.90. Thereafter the said Richard W. Murtaugh made a motion before the surrogate to correct the decree by striking therefrom the provision as to costs. This motion was granted, and from the order granting this motion the respondent in the proceeding here appeals.

By chapter 545 of the Laws of 1896 the laws regulating proceedings in cases of insanity were revised. By section 62 of the said Insanity Law the proceedings to determine the question of insanity were prescribed. It was therein provided by whom a petition could be presented; for the certificate of two qualified physicians before the commitment should be made, and for an order of commitment thereupon. This section was amended by chapter 146 of the Laws of 1903, but these provisions remained unchanged. By section 63 special provision is made for an appeal from that order of commitment. The appeal therein provided for is not an ordinary appeal from a final order in a special proceeding, but is an appeal to a justice of the Supreme Court, who shall cause a jury to be summoned, as in case of proceedings for the appointment of a committee of an insane person, and the question of the insanity of the alleged lunatic shall be there tried. By section 64 provision is made for the payment of certain costs of the proceedings by the town, city or county of the lunatic's residence and it is therein

provided that the judge may, in his discretion, charge the costs of the proceedings against the petitioner. This provision authorizing the charging of the costs as against the petitioner was stricken from the law by chapter 428 of the Laws of 1904. So that at the time that this proceeding was instituted there was no special authority of law for the charging of these costs as against the petitioner. The contention of the appellant, however, upon this appeal is, *first*, that this is a special proceeding under the Code of Civil Procedure, and the costs are authorized in the discretion of the court by reason of the Code provisions; *secondly*, that even if costs be unauthorized the remedy of the petitioner was by appeal, and not by motion. Section 3333 of the Code of Civil Procedure defines an action in the following words: "The word 'action,' as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." By section 3334 a special proceeding is thus defined: "Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding." The surrogate was probably right in holding that this was not a special proceeding within this definition. The proceeding is one for the protection of the alleged lunatic and for the protection of society. The petitioner neither gains nor loses by the order entered therein. No right is enforced, no wrong redressed, no public offense is punished. Moreover the intention of the law-makers is manifest to make special provisions for this proceeding, and not to bring the proceeding within the general rules of the Code of Civil Procedure governing special proceedings. The provisions of section 64 as to costs, which were eliminated by the amendment of 1904, would have been surplusage if it had been the intention that this should be a special proceeding wherein costs were to be governed by section 3240 of the Code of Civil Procedure. The remaining provisions of section 64, which are still in force, make provisions for costs of the proceedings not applicable to special proceedings generally. The provision of section 63 as to appeal from the order of commitment is a provision applying only to this class of cases, and in itself impliedly negatives the right

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to appeal as from a final order in a special proceeding under the Code of Civil Procedure. These provisions of section 63 also contain an answer to the appellant's contention that the remedy of the petitioner was by appeal rather than by motion. The appeal provided for by that section seems to be an appeal to a judge and jury upon the question of fact — the insanity of the alleged lunatic, and no appeal seems to be therein provided upon which the right of the surrogate to grant these costs could be reviewed. The petitioner's motion, therefore, was the proper, and apparently the only remedy, and as we are of the opinion that the amendment of section 64 of the Insanity Law by chapter 428 of the Laws of 1904 deprived the surrogate of the right to impose costs upon the petitioner, we conclude that the order should be affirmed, with ten dollars costs and disbursements.

All concurred; PARKER, P. J., not sitting.

Order affirmed, with ten dollars costs and disbursements.

UNITED TRACTION COMPANY, Appellant, v. FERGUSON CONTRACTING COMPANY, Defendant, Impleaded with FRANCIS S. WOODS and JAMES M. HAMILTON, Respondents.

Third Department, January 9, 1907.

Eminent domain — taking land for improvement of Erie canal — failure to file map, certificate, etc. — when lessee of railroad may enjoin appropriation of street.

Entry upon lands by a contractor for the purpose of improving the Erie canal under chapter 147 of the Laws of 1903 without the filing of the map, survey and certificate and without notice to the owner, is a trespass for which the State is not liable, but for which the contractor only is liable.

When such contractor intends to enter upon and appropriate a street upon which there is a surface railroad without the filing of the map and certificate and without notice, the railroad is entitled to an injunction restraining the contractor from entering, excavating or in any way interfering with its structures or rights.

The plaintiff, although the lessee of the railroad, may maintain the action even though its rights be considered personal property, for a lessee may recover not only for injury to his leasehold but for injury to the remainder as well.

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APPEAL by the plaintiff, the United Traction Company, from an interlocutory judgment of the Supreme Court in favor of the defendants Woods and Hamilton, entered in the office of the clerk of the county of Saratoga on the 10th day of August, 1906, upon the decision of the court, rendered after a trial at the Saratoga Special Term, sustaining the said defendants' demurrer to the complaint.

The defendants are constructing the barge canal under a contract with the State made in pursuance of chapter 147 of the Laws of 1903. The line of the canal thus to be constructed extends across Saratoga avenue in the village of Waterford. The complaint alleges that the defendants have constructed the canal up to the east and the west sides of said Saratoga avenue, and are about to excavate through Saratoga avenue in said village of Waterford a canal ditch thirty feet deep and one hundred feet wide. And further: "That no proceeding of any kind has been taken or any notice served by the State or by any of its officers to appropriate any part of the said railroad or any property or property rights connected therewith on said Saratoga avenue for canal purposes or for any other purpose."

The plaintiff is operating an electric trolley line upon and over Saratoga avenue at the point in question. It is operating this line as the lessee of the Troy and Lansingburgh Railroad Company — of all the structures, rights and franchises of said company. The said Troy and Lansingburgh Railroad Company was itself the lessee of such structures, rights and franchises from the Waterford and Cohoes Railroad Company, which is the owner of such structures and the original grantee of the rights and franchises necessary for the construction thereof. The relief sought is a permanent injunction restraining the defendants from entering upon the said Saratoga avenue and excavating the same or in any way interfering with the structures or rights of the plaintiff.

The defendants Woods and Hamilton demurred to the complaint for insufficiency. This demurrer was sustained at the Special Term and the interlocutory judgment entered from which this appeal was taken. Further facts appear in the opinion.

Patrick C. Dugan [*Lewis E. Carr* of counsel], for the appellant.

Edgar T. Brackett [*William S. Ostrander* of counsel], for the respondents.

SMITH, J. :

Chapter 147 of the Laws of 1903 makes provision for the improvement of the Erie canal. This improvement contemplates in some places a variation from the line of the canal as it now exists requiring the appropriation of new and additional land. By section 4 of that act it is provided that the State Engineer may enter upon and take possession of and use "lands, structures and waters, the appropriation of which for the use of the improved canals and for the purposes of the work and improvement authorized by this act, shall in his judgment be necessary." He is required to make an accurate survey and map of all such lands and annex thereto his certificate that the lands therein described have been appropriated for the use of the canals of the State. Such map, survey and certificate must be filed in the office of the State Engineer and a duplicate copy thereof filed in the office of the Superintendent of Public Works. The Superintendent of Public Works is thereupon required to serve upon the owner of any real property so appropriated a notice of the filing and the date of filing of such map, survey and certificate in his office, which notice shall also specifically describe that portion of such real estate belonging to such owner which has been so appropriated. It is further provided: "From the time of the service of such notice, the entry upon and the appropriation by the State of the real property therein described for the purposes of the work and improvement provided for by this act, shall be deemed complete, and such notice so served shall be conclusive evidence of such entry and appropriation and of the quantity and boundaries of the lands appropriated. * * * The Court of Claims shall have jurisdiction to determine the amount of compensation for lands, structures and waters so appropriated." By section 13 of the act the sum of \$10,000,000 is appropriated to be paid upon the presentation of the draft of the Superintendent of Public Works for work done upon the contracts, "or on the presentation of awards by the Court of Claims for compensation for lands appropriated, as provided in section four of this act, or damages caused by the work of improvement hereby authorized." Chapter 335 of the Laws of 1904 provides for the appointment of three special examiners and appraisers, whose duty it shall be to agree, if possible, with the owners "of such lands, structures and waters or *property rights pertaining*

thereto," and recites that upon such agreement the Treasurer will pay therefor the sum agreed upon.

In *Van Alstine v. Belden* (41 App. Div. 123) it is held: "Where a contractor, engaged in improving the Erie canal under a contract with the State of New York, piles earth upon private land adjacent to the canal, which the State has taken no proceedings to appropriate, the contractor, and not the State, is liable for the trespass." In that case is construed section 70 of chapter 338 of the Laws of 1894, which is precisely similar as to the mode of acquiring property as the act here in question. The opinion in part reads: "This brief epitome of two or three of the several enactments relating to the accession of lands for canal purposes, shows the trend of the Legislature has been to place in definite, systematic shape the method to be pursued in making the appropriation. In the first place, the power was vested in the Canal Commissioners, without any restriction as to the form in which they exercised that power. Their *ipse dixit* seemed to be all that was essential. Later, in the development of the method of acquiring these lands, the Legislature required the making of a survey and the filing of a map of the lands to be appropriated and the service of a notice containing a description of them upon the owner or occupant, as a prerequisite to the appropriation of the lands. This method relieved the State from liability arising from the acts of irresponsible contractors and assumed agents, and assured the owner the State was to award compensation for the lands taken. The drift of this legislation is to fix liability upon the State when these preliminaries have been accomplished. (*Hayden v. The State*, 132 N. Y. 533; *Yaw v. The State*, 127 id. 190; *City of Syracuse v. Stacey*, 86 Hun, 441; *Waller v. The State*, 144 N. Y. 579; *Matter of St. L. & A. R. R. Co.*, 133 id. 270.)" The judgment of the Appellate Division in that case was affirmed in the Court of Appeals upon the opinion from which quotation is made. (161 N. Y. 661.) It would seem, therefore, that any entry upon the lands upon the street without the filing of the map, survey and certificate required by the statute and notice to the owner would be as to such owner a trespass for which the State would not in any way be liable, and for which the contractor wrongfully entering upon such land could alone be held liable. It is urged by the respondents here that this action is not brought by the owner of the

land or structures, but only by a lessee for years of an interest in the land and structures, and that such an interest in the land is personal property, and for the acquisition thereof no notice is necessary under section 4 of the act of 1903, cited; that under section 13 of said act this plaintiff can recover its damages through the Court of Claims. If, however, the method of acquiring the land by the map, survey and certificate and notice be for the purpose of relieving the State "from liability arising from the acts of irresponsible contractors and assumed agents," as stated by Mr. Justice SPRING in the *Van Alstine Case* (*supra*), and the State is not liable for trespass to the owners of the land, it is difficult to see how the State could be made liable for the destruction of personal property while trespassing upon lands which the State had not acquired in the mode prescribed by the statute. If we assume for the argument that the notice required to be given by the Superintendent of Public Works is to be given only to the owner of the property and need not be given to a lessee for a term of years in possession of the property, nevertheless this lessee for a term of years in possession of structures which he is bound under the lease to return in as good condition as when taken under the lease would seem to have a clear right to enjoin an entry without lawful right as against the owner, which must result in inevitable damage to the structures leased. The State itself cannot appropriate personal property without a provision for compensation. The only authority for the appropriation of personal property is the implied authority found in section 13 of the act, which impliedly gives to the Court of Claims jurisdiction to determine damages caused by the construction and improvement of the canal. Whether the leasehold interest be real or personal property it is a sufficient interest to authorize an action of replevin brought by the lessee against a wrongdoer taking the property, or an action of trespass by the lessee against one doing damage, and in such action the lessee may recover not only the injury to his leasehold right, but also to the remainder. (*Cook v. Champlain Transportation Company*, 1 Den. 91, 104; *Baker v. Hart*, 123 N. Y. 473; *Dix v. Jaquay*, 94 App. Div. 555.) In these cases it is held that a tenant for life or for years is liable to the remainderman for all damage sustained by trespass, even by a stranger, and in an action for damages may recover for the whole injury to

the remainder estate even though no injury was suffered to the estate in tenancy. With the liability held in the above cases to rest upon the tenant rests the correlative right not only to recover in trespass for damage actually committed, but to prevent by injunction damage threatened. Irrespective, then, of the plaintiff's rights in the street itself as the lessee of structures thereupon, with liability for their destruction, it had the right to ask the court for its injunction preventing the unlawful entry by defendants upon the land in question and the destruction of those structures. The complaint stated a good cause of action, therefore. The interlocutory judgment should be reversed, with costs, and the demurrer overruled, with leave to the defendants to answer upon payment of costs of the demurrer and of this appeal.

All concurred; PARKER, P. J., not voting, not being a member of this court at the time this decision was handed down.

Interlocutory judgment reversed, with costs, and demurrer overruled, with costs, with leave to defendants to answer upon payment of costs of demurrer and of this appeal.

In the Matter of the Final Judicial Settlement of the Accounts of
JUDSON EDIE, as Sole Executor, etc., of JOHN McCLELAND, Late of
the Town of Greenwich, Deceased, Respondent.

THE AMERICAN BAPTIST HOME MISSION SOCIETY and THE AMERICAN
BAPTIST MISSIONARY UNION, Appellants.

Third Department, January 9, 1907.

Will construed — counsel fees.

A testator bequeathed the use of the sum of \$2,000 to his niece for life, providing that if at any time she should have a child or children who should arrive at the age of ten years, she should have the sum absolutely. If the beneficiary died before the child arrived at ten years of age the sum was given to her child or children if she had any. If she died without child or children, the legacy was to go to a missionary union, which was also made the residuary legatee. By a codicil the testator provided that whereas he had given his niece the use of \$2,000 for and during her natural life, he now in his codicil gave and

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bequeathed to her "the use of \$2,000 more, making \$4,000 for and during her natural life. At her death the principal to go as given and directed in my said will."

Held, that the testator intended to give to his niece the life use of \$4,000 instead of \$2,000, and that in the event of her having a child who should arrive at the age of ten years, the \$4,000 should be hers absolutely;

That even though the codicil were ambiguous in respect to the absolute right to \$4,000, if a child attained the age of ten years, that construction would be given which preferred those of the blood of the testator to strangers;

That counsel fees paid by the executor to collect moneys from the coexecutor was properly chargeable to the estate, being paid not solely for his own benefit but for that of the estate as well.

APPEAL by the American Baptist Home Mission Society and another from a decree of the Surrogate's Court of the county of Washington, entered in said Surrogate's Court on the 5th day of May, 1906, settling the accounts of the respondent.

Upon the accounting in this matter the American Baptist Home Mission Society contested the accounts of the executor and objected to two items therein, one showing a payment of a legacy to Jennie King Hicks of \$4,000, and one showing a payment for counsel and legal services of \$750. Both of these items, as well as an item of \$250 for legal services on the accounting, which is also objected to, were allowed by the surrogate and this appeal has resulted.

The accounting involved the construction of the will and codicil of the testator, John McClelland, who died in 1887. His will was dated November 29, 1884, and his codicil July 28, 1887.

The 9th and 16th paragraphs of the will are as follows:

"9. I give and bequeath to my niece, Jennie King, of Mentor, in the State of Ohio, the use of the sum of Two Thousand Dollars, for and during her natural life. If at any time she should have a child who should arrive at the age of ten years, then I give and bequeath the said Two Thousand Dollars to the said Jennie King absolutely. If she dies before any such child arrives at the age of ten years, then I give the same to her child or children under ten years of age, if she then shall have any. And if she dies without child or children, then the said legacy is to go to the American Baptist Missionary Union to be paid to any officer of said institution who has the proper authority to receive the same and his receipt shall be a sufficient discharge for my executors therefor."

"16. All the rest, residue and remainder of my property, of every name and nature, I give, bequeath and devise to The American Baptist Home Missionary Society, formed in New York in the year 1832, to be paid to any officer of said Society duly authorized to receive the same, whose receipt shall be a sufficient discharge for my executors therefor."

The 7th paragraph of the codicil is as follows:

"*Seventh.* Whereas in my said will I have given to my niece Jennie King of Mentor, Ohio, the use of Two Thousand Dollars for and during her natural life. Now in my codicil I give and bequeath to her the use of Two Thousand Dollars more, making Four Thousand Dollars for and during her natural life. At her death the principal to go as given and directed in my said will."

D. W. Perkins, for the appellants.

F. H. Mason and *Herbert Van Kirk*, for the respondent.

CHESTER, J.:

The learned surrogate was of the opinion that the testator intended to give Jennie King, now Jennie King Hicks, the life use of \$4,000 instead of \$2,000, and that, in the event of her having a child who should arrive at the age of ten years, such \$4,000 should be hers absolutely, and that the purpose of the testator evidenced by the 7th clause of the codicil was to add \$2,000 to the \$2,000 bequeathed by the 9th clause of the will, upon the same terms mentioned in that clause. In this we think he was clearly right. In the 7th clause of the codicil, after describing somewhat inaccurately what his gift to Jennie King in the 9th clause of his will was, the testator says: "I give and bequeath to her the use of Two Thousand Dollars *more*, making Four Thousand Dollars," which clearly shows that he intended by the codicil simply to change the word *two* to *four* in the 9th clause. It is true that he says in the codicil that "*At her death* the principal to go as given and directed in my said will." The appellants urge that by this he intended that the \$2,000 should at her death fall into the residue and go to the American Baptist Home Mission Society under the 16th clause of the will. We cannot agree to this, and think instead that he intended it should "go as given and directed" in the 9th clause,

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which it was the purpose of this item of the codicil to modify. In such 9th clause he had given the amount there bequeathed to Jennie King; if she died before any child of hers arrived at the age of ten years, to such child or children, and if she died without children, then to the American Baptist Missionary Union. But by the same clause he gave her the right to it absolutely if at any time she should have a child who should arrive at the age of ten years. The words "at her death" in the codicil, when related to the provisions of the 9th clause of the will, may fairly be construed to mean at her death before any child of hers arrived at the age of ten years or at her death without children. It cannot be that the testator intended by this codicil to discriminate against the children of Jennie King, and to provide that moneys, the use of which had been given to their mother for life, should if she lived until they had passed the age of ten years be given to a stranger to her blood, when he had shown such solicitude to protect her children in the very clause of the will which he was modifying by the codicil.

Even though the contention of the appellants with respect to the construction of this will is equally as probable as the construction we choose to give it, nevertheless we are required to construe it as we do under the well-settled rule that where a will is capable of two interpretations the one should be adopted which prefers those of the blood of the testator to strangers. (*Wood v. Mitcham*, 92 N. Y. 375, 379, and cases there cited.)

Neither of the contingencies mentioned in the 9th clause of the will having happened and Mrs. Hicks having a child who has arrived at the age of ten years, she became entitled to the bequest of \$4,000 absolutely, and the executor, therefore, properly paid it to her.

The item of \$750 allowed for counsel fees and legal services paid by the executor to his attorney was proper. The portion of the charge for collecting a considerable sum from the coexecutor was not alone to save the accounting executor from loss, but was for the benefit of the estate as well. Nor is there any evidence in the case disputing that given as to the value of all the services covered by this item.

The allowance of \$250 to the attorney for services on the accounting was for services about which the surrogate must have had personal knowledge not only as to the time spent but as to the value of

the services rendered, as they were rendered before him. He has certified in the decree the amount there allowed for such services "to be a fair compensation therefor," and we see no reason for disturbing his conclusion with respect thereto.

The decree should be affirmed, with costs.

Decree unanimously affirmed, with costs; PARKER, P. J., not sitting.

WILLIAM E. KERIN, Respondent, v. UNITED TRACTION COMPANY,
Appellant.

Third Department, January 9, 1907.

Negligence — collision between wagon and street car — when failure to signal immaterial.

In an action to recover for personal injuries received from the collision of a street car with a grocery wagon upon which the plaintiff was riding, where the plaintiff has failed to except to a charge that the driver of the wagon was the agent of the plaintiff and that his knowledge was imputable to the plaintiff, it is error for the court to refuse to charge that if the driver saw the approaching car it was unimportant whether or not the bell was sounded.

SMITH, J., dissented.

APPEAL by the defendant, the United Traction Company, from a judgment of the County Court of Rensselaer county in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 7th day of June, 1906, upon the verdict of a jury for \$500, and also from an order entered in said clerk's office on the 7th day of June, 1906, denying the defendant's motion for a new trial made upon the minutes.

P. C. Dugan, for the appellant.

James V. Coffey, for the respondent.

CHESTER, J. :

The action was for negligence. The case was submitted to the jury by the court under the rule of law that notwithstanding negligence upon the part of the plaintiff, he might nevertheless recover if the defendant after such negligence occurred knew it or could by

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the exercise of ordinary care have discovered it in time to have avoided the infliction of the injury.

The plaintiff was riding near the defendant's track in a one-horse open grocery wagon driven by one Barringer, a servant of his, when both were injured by a car operated by the defendant running into their wagon at the rear and throwing them from their seat. The accident happened in broad daylight on a straight level street. The car had followed the wagon for a distance of about six hundred feet before the collision occurred. There was a sharp conflict in the evidence as to whether or not the motorman sounded his gong as a warning to the plaintiff's driver, and there was evidence that he saw that the car was approaching from the rear. The court charged the jury without exception that Barringer was the agent of the plaintiff, and that if he saw the approaching car his knowledge was imputable to the plaintiff.

But the court refused to charge at the request of defendant's counsel that if the jury find that Barringer saw the car approaching then it was unimportant if the bell was not sounded. The failure to charge as requested in this respect was error, as the only object of sounding the bell was to give a warning of the approach of the car, and if Barringer saw the car approaching no warning was necessary. (*Thompson v. Metropolitan St. R. Co.*, 89 App. Div. 10, 12.) We cannot say that the jury was not misled to the prejudice of the defendant by this failure to charge and think that there must be a new trial.

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

COCHRANE, J., concurred; KELLOGG, J., concurred in result; SMITH, J., dissented; PARKER, P. J., not sitting.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

WILLIAM LEAHY, Respondent, v. GAYLORD AND EITAPENC COMPANY,
Appellant.

Third Department, January 9, 1907.

Evidence—opinion as to permanency of injury not based on facts.

Medical experts should not be allowed to express an opinion as to the permanence of an injury when the opinion is not based on facts submitted to the jury, but is pure conjecture.

Such opinion cannot be based on the testimony of the plaintiff, as the opinion determines the effect of his evidence.

Nor can the opinion be based upon the fact that the witnesses dressed the plaintiff's head after the accident and found a fissure in or fracture of the skull, the extent of which they did not investigate, and that shortly before the trial they found a scar and slight depression.

When the verdict shows that the plaintiff was awarded damages for a permanent injury instead of for the loss of a few days' time it is evident that such expert testimony was prejudicial, and a judgment for the plaintiff should be reversed.

APPEAL by the defendant, Gaylord and Eitapenc Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Broome on the 5th day of February, 1906, upon the verdict of a jury for \$1,467, and also from so much of an order entered in said clerk's office on the 5th day of February, 1906, as denies the defendant's motion for a new trial made upon the minutes.

Maurice E. Page, for the appellant.

James F. Loughlin, for the respondent.

KELLOGG, J.:

The plaintiff was injured by an iron pipe falling on his head, and the verdict establishes that the negligence of the defendant's employees caused the injury. The plaintiff swears that since the injury he is nervous, at times is dizzy, is irritable, and suffers pain in his side and in his head, and that his memory is defective. His evidence upon the trial tended to show that he had a good memory. There is nothing except the evidence of himself and wife to indicate that he is now suffering from any cause. He received a verdict for \$1,467.

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To prove that the injuries were permanent he called two physicians who treated him. Their evidence tends to show that they first saw him a month or so after the accident, and that then there was a running sore upon his head. They opened up the scalp and discovered, one says, a fissure in the skull, the depth and details of which he did not investigate; the other speaks of it as a fracture, the depth and details of which he did not thoroughly examine. They scraped the bone and cleansed and dressed the wound. The wound healed, but there is apparently a slight depression and scar at the spot where the injury was. There are no other physical indications of the injury. These physicians were permitted to testify, from all their treatment and examination of the plaintiff and their examination of him the day before the trial, that it was reasonably certain that his injuries will be permanent. This class of evidence was objected to upon the ground that it was immaterial, incompetent, irrelevant, no proper foundation laid and assuming facts not proved, which objection was overruled. The physicians had stated no facts about the examination the day before the trial, except that they made it for the purpose of ascertaining the plaintiff's condition. They had stated to the jury no fact tending to show that the plaintiff had sustained any permanent injury. They were permitted to express an opinion without stating to the jury any fact upon which it was based. If we assume that their evidence was based upon the facts sworn to by plaintiff, then they determined the effect of the plaintiff's evidence and what facts it established.

The evidence was clearly inadmissible. (*Davis v. Maxwell*, 108 App. Div. 128, 133.) The mischief of such evidence is emphasized by the further examination of the physicians, which shows clearly that their evidence as to the permanency of the injury is based entirely upon conjecture and is a mere statement of possibilities. (*Briggs v. N. Y. C. & H. R. R. Co.*, 177 N. Y. 59.)

Two days after the injury the plaintiff returned to his work and worked overtime for several days, and continued upon the work until the job was finished, and he has performed about the same amount of work since the injury as before. He is a skilled plasterer, engaged in doing finishing work, and is not continually employed, but works from job to job as occasion permits. The

defendant contended that the plaintiff had suffered no permanent injury, and had lost only a few days' time. The substantial verdict shows that the jury must have allowed for a continuing injury, one more or less permanent. The evidence of the physicians was, therefore, prejudicial, and without it the evidence does not fairly sustain the conclusion that the plaintiff suffered a permanent injury. The judgment should, therefore, be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred; PARKER, P. J., not voting, not being a member of this court at the time this decision was handed down.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

WILLIAM THAYER, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Third Department, January 9, 1907.

Negligence — trespasser on railroad struck by train — expert testimony raising question of fact as to ability to stop train.

The plaintiff, a trespasser, was struck by a freight train while his foot was caught in a cattle guard in the defendant's track, and seeks to recover damages for the injuries received. The engineer testified that when 375 feet from the cattle guard he saw the head and shoulders of some one who was swinging his hat for the train to stop, and that he immediately did all he could to stop the train. The train consisted of five loaded and two empty freight cars equipped with air brakes. It was descending a grade of about 148 feet to the mile at a speed of five or six miles an hour. Two experts testified that under such circumstances the train should have been stopped within 50 to 200 feet from the place where the power was first applied.

Held, that the credibility of the experts was for the jury, since upon their testimony the engineer might be found negligent, and a nonsuit was error; That the trial judge could not fairly pass upon the probability of the truth of the evidence until after the jury had considered the case.

CHESTER, J., dissented.

APPEAL by the plaintiff, William Thayer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Albany on the 27th day of November,

1905, upon the dismissal of the complaint by direction of the court after a trial at the Albany Trial Term.

Fletcher W. Battershall [*J. Newton Fiero* of counsel], for the appellant.

Harris & Rudd [*William P. Rudd* of counsel], for the respondent.

KELLOGG, J.:

The plaintiff caught his foot in a cattle guard in the defendant's track and was run over by an approaching train, receiving serious injury for which he seeks to recover. It is conceded that the plaintiff had no business on the track, and the defendant was not called upon to exercise any care in looking out for his safety until it saw that he was in danger, and was then required to exercise the care which the known circumstances required to prevent an injury to the plaintiff. It, therefore, became necessary for the plaintiff affirmatively to show at what particular time before the accident the engineer of the train first saw that plaintiff was imperilled, and for that purpose he called the engineer who swore that when the engine was about 375 feet from the plaintiff the fireman notified him that some one at the cattle guard was swinging the train up, and he saw the plaintiff's head and shoulders, but by reason of an obstruction could not see the remainder of the plaintiff's person. Upon cross-examination the witness swore that he immediately did all that he could to stop the train. The plaintiff saw the train and was swinging his hat as a warning all the while the train was approaching. The train consisted of five loaded freight cars, two empty cars, the engine and tender. The engine and some of the cars were equipped with air brakes. The brakes when tested just before the accident worked properly, and it is not shown that any of the appliances of the train or engine failed to act properly. At a speed of five or six miles per hour the train was descending a grade of about 107 to 187 feet per mile, or an average grade of about 148 and 84 / 100 feet per mile. It stopped about 325 feet beyond the cattle guard, or about 700 feet from the place where the engineer first saw plaintiff's position. The track was in good condition.

The plaintiff called two witnesses who qualified as experts in the

management of a train, the conditions governing this train were stated and their testimony tended to show that if the engineer had done what he says he did the train should have been stopped within 50 to 200 feet of the place where the power was first applied. The plaintiff contended that this evidence presented the question of fact for the jury whether, after the emergency was known to the engineer, he did what reasonably could have been done to stop his train. The engineer of the train was the party at fault, if there was any fault with the defendant, and that fact was proper to consider with reference to his credibility. While we may feel that it is not entirely probable that this train, upon such a grade, could be stopped within the distance indicated by the experts, the question of their credibility, and the probability of their testimony, rested with the jury, and not with the court in the first instance.

In reviewing this nonsuit we must assume the most favorable view of the evidence in favor of the plaintiff, giving him the benefit of any inferences which may properly be drawn from it. The jury might have found, upon all the evidence, that the engineer did not make a proper effort to stop the train, and that if he had done all he could do to stop it the accident would not have happened. After verdict found the presiding justice has a right to order a new trial if he feels that it is based upon evidence which is entirely unreliable and improbable. But he could not fairly pass upon those questions until after the jury had considered the case. The judgment is, therefore, reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except CHESTER, J., dissenting; PARKER, P. J., not voting.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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In the Matter of the Appraisal of the Estate of JOHN D. PARSONS, JR., Deceased, under the Acts Relating to Taxable Transfers.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;
AGNES E. PARSONS, as Executrix, etc., of JOHN D. PARSONS, JR.,
Deceased, Respondent.

Third Department, January 9, 1907.

**Tax — assignment of insurance policies if assignee survive insured —
when not liable to transfer tax.**

A policy of life insurance differs from other contracts in that it is not ordinarily intended to benefit the insured, but others after his death.

Hence, when one owning insurance policies which were originally payable to his estate assigns them to his wife if she survive him and the rights of no third parties have intervened and there is no conflict as to the title to the policies, they are not subject to the transfer tax on the death of the insured.

Such an assignment is not an assignment "intended to take effect in possession or enjoyment at or after such death," as contemplated by the statute. The assignee obtains an immediate right to enjoy the moneys when payable as death losses, even though the assignee's title may be defeated by her death during the lifetime of the insured.

The fact that the policies, with assignments attached thereto, were found in the safety deposit box of the insured, does not show that the duplicate assignments filed with the insurance company were not so filed by the assignee. Under such circumstances the deceased cannot be deemed to have been possessed of the policies at the time of his death, nor does the widow take title to them through his will or the laws of the State.

APPEAL by the Comptroller of the State of New York from a decree of the Surrogate's Court of the county of Albany, entered in said Surrogate's Court on the 31st day of July, 1906, confirming the appraisal of the estate of John D. Parsons, Jr., deceased, under the Transfer Tax Law.

Robert E. Steele, for the appellant.

Charles J. Buchanan [*Robert E. Whalen* of counsel] for the respondent.

KELLOGG, J. :

With reference to the stocks and the policy of insurance in the New England Mutual Life Insurance Company, the determination

of the surrogate is so clearly right that it is unnecessary to discuss those subjects.

With reference to the two policies in the Connecticut Mutual Life Insurance Company, the determination requires consideration. Those policies, upon their face, were payable to Mr. Parsons' estate. At his death, they were found in his safe deposit box. Attached to each policy was an assignment of it (dated October 21, 1903), in consideration of love and affection, to his wife, if she survived him; otherwise to his estate. One policy was payable to the assured if he lived twenty years, and in the assignment he reserved the cash payment if he lived for that period. The assignments were executed in duplicate upon blanks furnished by the company, one of which duplicates was filed with the company as required by the policy. The company paid the amount of the policies to the assignee January 7, 1905, both assuming that the assignments transferred valid title to the policies.

The Comptroller now contends that under section 220 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 284) a tax is payable upon the transfer of those policies upon the theory that the transfer was (1), by death, or (2), by an assignment to take effect in possession or enjoyment at the death of the decedent. No one interested in the decedent's estate, or who had any claim upon him, questions the validity or effect of the assignments. The Comptroller alone objects. The assignments were witnessed by a subscribing witness, and are under seal, and permit us to assume that they are supported by an adequate consideration. (*Von Schuckmann v. Heinrich*, 93 App. Div. 278.) We, therefore, are not required to treat the assignments as an attempted gift.

At the time of the assignments, the only parties to the contracts, and the only persons interested in them, were the insured and the company. The company was interested in having a proper risk, and to see that its premiums were paid. Its only interest in the beneficiary was to know with certainty to whom the money was to be paid. The insured was principally interested in the beneficiary, as he was paying his money for a benefit to be received after his death by some one in whom he was interested. At the time the policies were obtained the insured could have directed the benefit to be paid to any one he desired, and he had the right, with the

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consent of the company at any time to change the beneficiary as he might desire so long as no other person had any property interest in the insurance. When he made the assignment and the duplicate assignments were filed with the company, no one having any conflicting interest, it was equivalent to a change of designation and was considered by him and the company as such. And it may here be given the same force and effect as though the indorsement had been made upon the policy by the parties thereto that such change was made.

It is assumed by the appellant that the assignor lodged the duplicate assignments with the insurance company. The evidence does not show whether this was done by the assignor or the assignee. There is nothing to show that the assignee herself did not cause the duplicates to be filed with the company. The assignment is found with the company, where the policy required it to be and where we would naturally expect to find it. The only thing throwing any doubt upon the title of the assignee is that the policies were found, with the duplicate assignments attached, in the decedent's safe deposit box. That is not to be wondered at when we remember that the assignee was the wife of the insured and that he might naturally have the custody of her papers. The State cannot hang a tax upon that circumstance when other facts so clearly point to the rights of the widow.

A policy of insurance differs from other contracts, as it is not ordinarily intended to bring a benefit to the insured himself but to others after his death. If this were a conflict between parties having mutual claims upon the insured, or having conflicting interests by assignment or otherwise, the question might require more serious consideration; but as against the State seeking to collect a tax from the beneficiary and thus deprive her of a part of the insurance money, I think the deceased was not possessed of the policies at the time of his death, and that the widow did not obtain title to them through his will or by the laws of the State. The statutes of this State favor and encourage insurance for the benefit of a wife, and the State is at a disadvantage when it seeks to tax such a provision for her, when the company and all others recognize her right to the benefit intended.

This is not a case of an assignment "intended to take effect in

possession or enjoyment at or after such death," as mentioned in the statute. It was an absolute present assignment of the interest of the assignor in the policy. But the policy was payable at his death, and, therefore, the assignment provided that it was payable to her if she survived him.

The assignment of a policy of insurance payable only after the death of the insured differs from the assignment of a chose in action, which is payable at some particular time. It is quite usual in insurance policies that the beneficiary is named as such if she survives the insured. But that does not make it, within the meaning of the Tax Law above cited, a provision to take effect after the death of the assured. She obtains an immediate title and right to enjoy the moneys when they become payable as death losses. Her title might be defeated by her death during his lifetime.

In *Hurlbut v. Hurlbut* (49 Hun, 189) an assignment of a policy in substantially the same form as this was left with the company, and a letter written to the assignee, the daughter of the assured, stating that it had been assigned. It was held that the assignment was effectual as against the creditors of the insured.

In *Phipard v. Phipard* (55 Hun, 433) the assured attached to the policy an assignment to his children and deposited it with a safe deposit company, and spoke of the policy as belonging to the children. Held, that he was a trustee for the children.

In *Grogan v. U. S. Industrial Ins. Co.* (90 Hun, 521) the insured executed a paper requesting and authorizing the company in case of his death before the death of the plaintiff to pay the moneys to her. The instrument was filed in the county clerk's office and it was held to be a legal assignment.

In *McDonough v. Aetna Life Ins. Co.* (38 Misc. Rep. 625) it was held that filing an assignment by the insured with an insurance company was a valid transfer of the policy.

I am satisfied that no transfer tax is assessable on account of these policies and that the decree of the surrogate should be affirmed, with costs.

Decree unanimously affirmed, with costs; PARKER, P. J., not voting, not being a member of this court at the time this decision was handed down.

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Third Department, January, 1907.

CLARENCE L. BARBER, as Assignee of HORACE M. HOOKER and
DAVID J. MCGOWN, Judgment Creditors, Plaintiff, v. CURTIS A.
BARNUM, Judgment Debtor, Appellant.

CHATFIELD LEONARD, as Receiver of the Property of CURTIS A.
BARNUM, Respondent.

Third Department, January 9, 1907.

**Supplementary proceedings—application of receiver to sell debtor's
interest in real property—prior judgment as bar.**

A motion by a receiver in proceedings supplementary to execution for leave to sell a judgment debtor's interest in real property consisting of a remainder, will be denied when it appears that the question is *res adjudicata* by reason of the denial of a similar application and the dismissal of the complaint in a prior action brought for the same purpose by the receiver's predecessor.

Although the denial of the prior application and the dismissal of the prior action were made upon the erroneous legal conclusion that the receiver's right to sell the remainder must be postponed until the death of the life tenant, the prior decisions are nevertheless *res adjudicata* and bar a subsequent application for the same leave, and the receiver must await the death of the life tenant.

APPEAL by the defendant, Curtis A. Barnum, from an order of the Supreme Court, made at the Otsego Special Term and entered in the office of the clerk of the county of Otsego on the 13th day of September, 1906, granting a motion made by the receiver of the property of the defendant to renew a prior motion for leave to sell defendant's interest in certain property and granting permission to make such sale.

Carlton B. Pierce, for the appellant.

Clarence L. Barber, for the respondent.

COCHRANE, J. :

In the year 1886 Frank L. Smith was appointed receiver of the property of the defendant in proceedings supplementary to execution. Such receiver has since died and the respondent is his duly appointed successor. Defendant at that time had an interest under the will of his deceased father in certain real estate subject to the life interest therein of his mother. His mother is still living, and

his interest in the property now is the same as at the time of the appointment of the receiver, save that the real estate has been sold and the proceeds stand in the place thereof. The order appealed from permits the sale by the receiver of the defendant's interest in such property.

In the year 1888 the receiver moved at Special Term for leave to make such sale. The motion was denied, but the order of denial permitted the receiver to bring any action he might deem advisable for the collection of the claims he represented, out of defendant's interest in his father's estate.

No appeal was taken from such order, but an action was instituted by the receiver, Smith, against the defendant and others interested in the property wherein it was sought to sell defendant's interest therein and to apply the proceeds of such sale in payment of the judgments against him. Demurrers to the complaint for insufficiency were sustained by the General Term. (*Smith v. Barnum*, 50 Hun, 602.) The complaint was subsequently dismissed on the merits.

In the year 1903 the present receiver and the judgment creditors instituted another action against the defendant and other parties interested in the fund alleging in their complaint with changed phraseology substantially the same facts which had been alleged in the complaint in the prior action and demanding relief which practically would have accomplished the same object which was sought to be accomplished by the prior action. The defense of *res adjudicata* was interposed, sustained, and the complaint dismissed on the merits. It was found as a conclusion of law and the judgment declared that the former action brought by Smith, as receiver, was *res adjudicata* against the plaintiffs as to the cause of action set forth in the complaint and was a bar thereto. This judgment was affirmed by the Appellate Division without opinion* and by the Court of Appeals "without prejudice to the right of the plaintiffs to demand and receive the trust fund upon the death of the life tenant." (See *McGown v. Barnum*, 182 N. Y. 547.) Thereafter the motion was made which resulted in the order now under consideration.

The foregoing recital of facts leads to a reversal of such order.

* See *McGown v. Barnum* (98 App. Div. 623).—[REP.]

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The Court of Appeals in its opinion, in speaking of the two actions, said: "We deem the plaintiffs concluded by the judgment in that action which was pleaded as a bar to this. The first suit was brought on substantially the same allegations as set forth in the present complaint and some of the relief demanded was the same as that now sought. The final judgment rendered was that the action was prematurely brought and the complaint was dismissed on the merits. * * * The judgment sustaining the demurrer is conclusive between the parties that the plaintiffs were then entitled to no relief, and the situation has not been in any respect changed from the time of the institution of that action to the commencement of this."

It only remains for us to add that the situation has not been in any respect changed down to the present time. It has been duly adjudicated by judgment that proceedings to enforce the claims of the receiver against the defendant's interest in the trust fund must await the death of the life tenant. It is too late now for the respondent to escape the effect of such adjudication.

This motion seems to have been made as the result of a misconception of the said opinion of the Court of Appeals. That court held that the defendant's interest in the trust fund vested in the receiver and could be sold by the latter. It was not intended to intimate, however, that the receiver may now make such sale. That remedy should have been awarded in 1888 when the receiver Smith first made at Special Term his motion for that purpose and instituted the first action. Such remedy, however, was denied under the mistaken view as indicated in said opinion of the Court of Appeals that a sale before the death of the life tenant would be premature. It is this adjudication, although erroneous, which must conclude the receiver on this motion, as it concluded him in the last action which was before the Court of Appeals.

As intimated by that court, it is regrettable that the subject of this controversy should have been the occasion of so much unnecessary litigation. We also regret that an error should have been made in the early history of the litigation whereby the receiver was deprived of an existing right. But it has been judicially declared, although erroneously, that whatever right he has must abide the event of the life tenant's death, and we are powerless to avoid the effect of such determination.

The order must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs, such costs and disbursements, however, to be applied in reduction of the judgments represented by the receiver.

All concurred; PARKER, P. J., not sitting.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs; such costs and disbursements, however, to be applied in reduction of the judgments represented by the receiver.

FRED R. BADGER, Appellant, v. NORMAN COOK, Respondent.

Third Department, January 9, 1907.

Sale — smuggled goods confiscated by government — facts requiring submission of case to the jury — principal and agent — evidence of agency — when principal not charged with knowledge of agent.

The defendant sold smuggled cattle which were subsequently confiscated by the Federal government. In an action by the buyer against the seller it was shown that the plaintiff gave a check to his agent to the order of the defendant to pay the purchase price, on the face of which was written "for five yearlings." The check was received and indorsed by the defendant and the cattle were actually delivered on the plaintiff's farm and remained there until seized. Shortly before the seizure the plaintiff told the defendant that he understood that officers were "after those cattle I bought of you, or Pond bought for me." The defendant replied that if they were seized he would settle.

On the issue as to whether the sale was made to the plaintiff or to his agent, Pond,

Held, that it was error to dismiss the complaint on the theory that the cattle were sold to Pond and not to the plaintiff;

That the evidence required the submission to the jury of the question as to whether the sale was made to the plaintiff or to Pond;

That it was error to exclude the conversation between the plaintiff and his alleged agent in reference to the cattle prior to their purchase for the purpose of proving the agency;

That although the defendant gave evidence that the plaintiff's agent was told that the cattle were smuggled prior to his agency that knowledge was not chargeable to the principal in the absence of clear proof that the knowledge was present in the mind of the agent when the purchase was subsequently made. The burden is on the party seeking to charge a principal with knowledge

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of his agent, acquired at a different time and in a different transaction when he was not representing the principal, to show by clear evidence that the knowledge sought to be charged to the principal was present in the agent's mind at the time of the transaction in issue.

APPEAL by the plaintiff, Fred R. Badger, from a judgment of the County Court of Franklin county in favor of the defendant, entered in the office of the clerk of the county of Franklin on the 22d day of December, 1905, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's evidence after a trial before the court and a jury, and also from an order bearing date the 22d day of December, 1905, and entered in said clerk's office denying the plaintiff's motion for a new trial made upon the minutes.

Kellas & Genaway [*J. P. Kellas* of counsel], for the appellant.

Main & Bryant, for the respondent.

COCHRANE, J. :

It is alleged in the complaint that in the year 1900 plaintiff through an agent purchased of the defendant five yearling heifers and paid therefor seventy-seven dollars; that prior to said purchase said heifers had been smuggled into the United States from the Dominion of Canada; that in the year 1903 they were confiscated by the Federal government; and that by reason of such facts no title thereto was conveyed to the plaintiff, and that the sale thereof by the defendant to the plaintiff was void and without consideration; and judgment was demanded for the consequent damages sustained by plaintiff.

On the trial the unlawful entry into this country from Canada of the property in question without the payment of duty and its subsequent seizure and sale by the Federal government was admitted. At the close of plaintiff's evidence the County Court dismissed the complaint on the ground that the sale by defendant was not to the plaintiff but to one Pond, his alleged agent.

Plaintiff produced a check made by himself October 15, 1900, payable to the order of the defendant for seventy-seven dollars, the purchase price of the cattle, which was indorsed by the defendant and paid October 26, 1900. On the face of the check was written

"for 5 yearlings." Plaintiff testified that those were the yearlings in question; that he "gave the check to Pond to take to Cook to pay for the cattle;" that they were delivered on plaintiff's farm and remained there until August, 1903, when they were seized; that shortly prior to the seizure, having then been informed of their liability to such seizure, he told the defendant that he was informed that the officers were "after those cattle I bought of you or Pond bought for me," and asked the defendant if they were all right, to which defendant replied: "They are all right; if they seize them I will settle." This was all the testimony bearing on the question as to whether the sale was made to plaintiff or to Pond and it was clearly sufficient to require the submission of that question to the jury. The purchase price was concededly furnished by the plaintiff. The cattle were delivered on his farm and remained there for three years until their confiscation. Plaintiff's statement to the defendant to the effect that he had bought the cattle or that Pond had bought them for him was uncontradicted. It would have been a proper inference by the jury from this evidence that Pond acted merely as agent of plaintiff in delivering the check to the defendant and in bringing the cattle from the defendant to the plaintiff in return for the check.

It was also error to exclude the conversation between plaintiff and Pond in reference to these cattle just prior to their purchase from the defendant. This conversation was offered for the purpose of proving the agency of Pond in respect to the cattle and should have been received for such purpose.

It is further sought to sustain this judgment on the theory that plaintiff and his agent Pond knew that the cattle had been smuggled. Before they were owned by the defendant they had been owned by one Dougherty who smuggled them from Canada. While so owned by Dougherty, plaintiff and Pond at different times and independently of each other looked at them with a view to purchasing them. Dougherty testified that he at that time told both of them that the duty had not been paid. Plaintiff denied any knowledge of this latter fact and also testified that when he bought the cattle he did not know they were the same cattle which Dougherty once had. A question of fact thus arose as to whether or not plaintiff knew the cattle had been smuggled.

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Pond was not a witness, and Dougherty's testimony that he told Pond of the non-payment of the duty is uncontradicted. It is claimed that plaintiff is chargeable with this knowledge of his agent, Pond. When Dougherty told Pond that the duty had not been paid, the latter was not plaintiff's agent. Whatever information Pond obtained from Dougherty was received by him individually and independently of plaintiff. In *Slattery v. Schwannecke* (118 N. Y. 543) it was said: "The question how far a principal is chargeable with notice communicated to or knowledge acquired by his agent in another transaction at another time, when not acting for his principal, has recently received consideration in this court in the case of *Constant v. University of Rochester* (111 N. Y. 604) and the principle was there settled that the knowledge of the agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration by the court." The *Constant* case is also an authority for the proposition that the burden is on the party seeking to charge a principal with knowledge of his agent acquired by the latter at a different time and in a different transaction, when he was not representing the principal, to show by clear and satisfactory evidence that the knowledge sought to be charged to the principal was present in the agent's mind at the time of the transaction under consideration by the court. From the evidence it appeared that it was long prior to the sale by defendant when Pond negotiated with Dougherty and was told of the non-payment of duty. Dougherty testified that the cattle were then calves. Plaintiff testified that he did not know when he bought them that they were the same which Dougherty had. They had evidently grown and changed their appearance. If plaintiff did not recognize them it cannot be assumed that Pond recognized them when he acted as plaintiff's agent, or that he then had in mind the information which Dougherty had given him long prior thereto. Under the authority of the cases above cited the burden was on defendant to show clearly and satisfactorily that there was present in the mind of Pond when the sale in question was made the knowledge that the duty had not been paid, and such knowledge on his part under the evidence here produced cannot be assumed as matter of law.

The judgment and order must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred ; PARKER, P. J., not voting, not being a member of this court at the time this decision was handed down.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

CALLANAN ROAD IMPROVEMENT COMPANY, Respondent, v. VILLAGE OF ONEONTA, Appellant.

Third Department, January 9, 1907.

Contract — municipal paving contract — waiver of liquidated damages for delay.

When a municipal street paving contract providing for liquidated damages for delay by the contractor in completing the work within the specified time also requires the municipality to furnish the curbing, the liquidated damages are not recoverable when it appears that the curbing was not furnished so as to enable the contractor to perform within the time set. Such failure of the municipality to furnish the curbing as required is a waiver of its right to liquidated damages.

Although under the contract it may be incumbent upon such contractor to submit a claim for delay arising by reason of any act or omission of the municipality in order to diminish his liability for liquidated damages, such rule does not obtain when the damages are waived by the defendant.

When the original contract contemplated the paving of the street as it then existed, and thereafter the municipality proceeds to condemn land to widen the street, the provisions as to the time of performance by the contractor and for liquidated damages do not apply, for the increase of work caused by the widening of the street was not originally contemplated.

A party seeking the strict enforcement of the penalty in a contract must show himself to be without fault.

APPEAL by the defendant, the Village of Oneonta, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Otsego on the 4th day of January, 1905, upon the decision of the court rendered after a trial at the Otsego Trial Term, the jury having been discharged.

In August, 1901, plaintiff's assignor entered into a contract with the defendant, the village of Oneonta, to pave certain parts of

Main, Chestnut and Broad streets in said village and to set the curbing in said streets, and to furnish therefor all the labor and material except that the curbing was to be furnished by the defendant. By the contract the work was to be completed the first of the following November, and liquidated damages in the sum of fifty dollars were to be paid by the contractor for each day, Sundays and holidays excepted, after the said 1st day of November, 1901, during which the said work or any part thereof should remain unfinished. There was a provision in the contract that it might be necessary to defer the work on Chestnut street until the year 1902, in which case it was agreed that notice to that effect would be given to the contractor, which notice should fix the time during the year 1902 within which the work on Chestnut street should be performed, and that the provisions of the contract should apply thereto in all respects as fully as though constructed during the year 1901. Notice was given to the contractor by the defendant on August 27, 1901, that the work on Chestnut street should be deferred until the year 1902 and should be begun as soon as April 20, 1902, and completed by June 20, 1902. The work on Main and Broad streets was not completed until June, 1902, and the work on Chestnut street was not completed until August, 1902.

The defendant, seeking to enforce the provisions of the contract as to liquidated damages for non-performance of the work within the time specified by the contract, deducted from the contract price \$4,800, being \$50 a day for ninety-six days, thirteen of which were in November, 1901, forty-nine of which were after April 16, 1902, for delay in the Main and Broad street work, and thirty-four of which were after June 21, 1902, for delay in the Chestnut street work. By what method defendant fixed the number of days and the particular days, as above indicated, is not material to this inquiry. The trial court disallowed this claim for liquidated damages. The sole controversy here relates to the right of the defendant to enforce such claim.

D. W. Miller, for the appellant.

Page, Tully & Ferris [*H. D. Hinman* of counsel], for the respondent.

COCHRANE, J.:

In *Dannat v. Fuller* (120 N. Y. 558) it is said: "It is a well-settled rule that where one party demands strict performance as to time by another party, he must perform on his part all the conditions which are requisite in order to enable the other party to perform his part, and a failure on the part of the party demanding performance to do the preliminary work required in order to enable the other party to complete his within the time limited, operates as a waiver of the time provision in the contract."

In *Weeks v. Little* (89 N. Y. 566) the head note is as follows: "Where, by a building contract, damages for delay on the part of the contractor to perform his contract within the time limited were fixed and liquidated, and the work contracted for could not be completed until other work to be done by the owner was finished, held, that a failure on the part of the latter to finish his work in season to enable the contractor to complete his contract within the time specified was a sufficient excuse for delay, and discharged him from liability for the liquidated damages; and this although some work not affected by the delay of the owner was not completed within the time; that as the damages were payable upon a failure of entire completion, which was rendered impossible by the owner's act, a recovery could not be had for a failure which she made inevitable."

In the present case it appears that over 10,000 feet of new curbing was required to complete the work. This curbing the defendant by its contract agreed to furnish. It furnished less than 3,500 feet prior to November 1, 1901, the time fixed for the completion of the work on Main and Broad streets. No curbing was furnished for Broad street prior to that time. Some of the work on Main street also lacked curbing which was not furnished until 1902. No part of the contractor's work except excavation could be performed until the curbing, where new curbing was used, was furnished. These facts were proved by the defendant's engineer and under the authorities cited establish a waiver on the part of the defendant as to the provisions for liquidated damages so far as the work on Main and Broad streets is concerned. Defendant contends that it was incumbent on the contractor to submit to the defendant's engineer any claim for delay arising by reason of any

act or omission on the part of the defendant and that it was the province of such engineer to adjudge the number of days the work was delayed by reason of such fault of the defendant. That would doubtless be required under this contract had the defendant not waived the liquidated damages. That was the purport of the decision in *Phelan v. Mayor, etc., of New York* (119 N. Y. 86), greatly relied on by defendant. But there was no element of waiver in that case. Such requirement is only necessary for the purpose of diminishing the contractor's liability for liquidated damages and is of no consequence when such damages are waived by the defendant. The difficulty here is that the defendant not merely delayed performance of the contract, but made performance thereof impossible within the specified time.

After the defendant gave to the contractor notice deferring the work on Chestnut street until 1902 and fixing the time within that year during which the work should be performed it proceeded to acquire land for the purpose of widening such street. The contractor began work on Chestnut street May 29, 1902, and at that time the village was still engaged in the process of widening the street. To what extent the street was widened and how much additional work was thereby necessitated does not appear. But it is certain that additional time was required for the performance of such additional work. The contract between the parties had reference to the streets as they existed at the time such contract was made. It did not contemplate the widening of any of those streets and the increased work resulting therefrom. The contract was that the contractor should by June 20, 1902, complete the work on Chestnut street as such street was when the contract was made and not as it might be subsequently changed by the defendant. The provisions in the contract as to liquidated damages certainly do not apply to Chestnut street changed as it was by the defendant after the contract was made and in a manner not therein contemplated.

There is no claim in this case that the plaintiff and its assignor have not faithfully performed the contract except as to the time limits. The defense rests absolutely on nothing save that it is "so nominated in the bond." While the defendant is for that reason alone entirely justified in its claim, and it would be the duty of the courts to sustain it, nevertheless such claim is highly penal in its

characteristics, and whenever a party attempts to enforce such a claim he should be quite certain that he is himself without fault and has fully observed on his part the requirements of his contract.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs; PARKER, P. J., dissenting.

THE VILLAGE OF WAVERLY, Appellant, *v.* THE WAVERLY WATER COMPANY and Others, Respondents.

Third Department, January 9, 1907.

Eminent domain—condemnation of existing water works by municipality—when consent of State Water Commission not necessary.

Although section 2 of chapter 723 of the Laws of 1905 requires a municipal corporation before acquiring lands for "new or additional sources of water supply" to submit maps to the State Commission and procure its approval, the requirement applies only to proceedings to condemn lands for new or additional sources of water supply. The statute has no application where a municipality seeks to condemn a fully equipped and established system of water works which has theretofore furnished the local supply.

It seems, that one of the main objects of said statute is to protect municipalities and the inhabitants thereof from encroachment by other municipalities.

APPEAL by the plaintiff, The Village of Waverly, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Tioga on the 2d day of July, 1906, pursuant to an order entered in said clerk's office on the 11th day of June, 1906, denying the plaintiff's application for a judgment condemning the water system belonging to the defendant, the Waverly Water Company, and dismissing the proceeding, and also from the said order upon which the judgment appealed from was entered.

Frank A. Bell [*M. N. Tompkins* and *Randolph Horton* of counsel], for the appellant.

Frederick E. Hawkes, for the respondent Waverly Water Company.

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Reynolds, Stanchfield & Collin [*Frederick Collin* of counsel],
for the respondent Sawyer, as trustee.

J. B. Floyd, for the respondent Goff.

COCHRANE, J.:

The Waverly Water Company is the owner of a fully equipped and established plant whereby for a long time it has supplied the village of Waverly with water for domestic purposes and for the ordinary purposes of such a village municipality. Such plant consists of the appropriate franchises, lands, dams, easements, pipes, mains, reservoirs, hydrants and other property essential and pertinent to a water supply established and maintained for the purpose of supplying the needs and requirements of the village of Waverly.

By this proceeding the village seeks to condemn and take over said existing plant in its entirety and in precisely the same form in which it now exists and has long been maintained for the use of the village. The proceeding was dismissed, as stated in the order appealed from, "upon the ground that said plaintiff failed and neglected to take the proceeding and to comply with chapter 723 of the Laws of the State of New York for the year 1905 and to procure the consent of the State Water Supply Commission as in said Act required." The sole question now before us, therefore, is whether said act applies to the present proceeding.

The act, after creating a commission to be known as the State Water Supply Commission, declares in section 2 thereof as follows: "No municipal corporation or other civil division of the State, and no board, commission or other body of or for any such municipal corporation or other civil division of the State shall, after this act takes effect, have any power to acquire, take or condemn lands for any new or additional sources of water supply until it has first submitted the maps and profiles therefor to said commission, as hereinafter provided, and until said commission shall have approved the same."

It thus appears that the point of this controversy is whether the object sought to be obtained by this proceeding constitutes a condemnation of lands "for any new or additional sources of water supply" within the meaning of said statute. We are of the opinion that

the statute has no application to a situation such as is here presented and that it was unnecessary for the plaintiff to procure the consent of the State Water Supply Commission.

A careful perusal of the statute convinces us that a fully equipped water plant which is and has been used for supplying a village with water as in the present case is not a "new or additional" source of supply contemplated by the statute. The requirement as to the submission to the Commission of maps and profiles seems to be inapplicable to such a case. The 3d section of the act seems to contemplate the appropriation of a water supply new in the sense that it has been before unused. It is not existing but "proposed reservoirs and other works," not profiles of existing aqueduct lines and flow lines of water but profiles of such lines of water "when impounded," which are required to be submitted to the Commission. And throughout the section there was evidently in the legislative mind the idea of the construction and equipment of a system theretofore unused and not a mere change of ownership of a system already established and in complete working order.

It cannot be doubted that one of the main objects of the statute was to protect municipalities and the inhabitants thereof from encroachments by other municipalities. This is apparent from the provisions in section 3 of the act that the Commission shall determine whether the proposed plans "are just and equitable to the other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof," and that the Commission may make such modifications in the proposed plans "as it may deem necessary to protect the water supply and the interest of any other municipal corporation, or other civil division of the State, or the inhabitants thereof, or to bring into cooperation all municipal corporations, or other civil divisions of the State which may be affected thereby." Of course such object could find no application to the present case. And while this beneficial purpose of the act is by no means the only object sought to be obtained thereby it is not apparent how in a case like the present any beneficent result can be accomplished by subjecting the proceeding to the requirements of the act.

The only question here is whether the property of the Waverly Water Company shall continue to be owned by such company or whether the ownership shall be changed to the village of Waverly.

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It is the same property which is to be used in the same manner for the benefit of the same people and for the same purposes. It is a matter of no consequence to the State at large or to any civil division of the State or to any of the inhabitants thereof save to the parties to this proceeding whether this water shall continue to be furnished by the Waverly Water Company or whether it shall be furnished in the same manner and for the same purposes and to the same extent by the village of Waverly. If the village were seeking to acquire any land or rights which had not already been acquired by the respondent company for the purposes of water supply a different question would exist. But as the only question involved is a proposed change of ownership of an existing system and not the acquisition of any other rights the statute does not apply.

It may be said that this construction of the statute, in view of the fact that it only applies to municipal corporations and civil divisions of the State, would permit the acquisition of a new water supply by a person or corporation, which in turn might be immediately taken over by a municipality, and that thus the statute would be circumvented. That is doubtless true, and the Legislature, recognizing the frailty of the statute in this particular, amended it in the following year (Laws of 1906, chap. 415) so as to make it applicable, not only to municipal corporations and other civil divisions of the State, but also to individuals and other corporations. While this amendment does not affect this proceeding, it reflects light on the purpose and meaning of the statute.

The judgment and order must be reversed.

All concurred; PARKER, P. J., not sitting.

Judgment and order reversed, without costs, and proceeding remitted to the Special Term for further action.

WILLIAM R. WEED, Appellant, and FLORENCE J. STEENBURGH Respondent, Who Bring This Suit on Behalf of Themselves and of All the Other Stockholders of The First National Bank of Saratoga Springs, N. Y., Situated Similarly with Themselves, v. THE FIRST NATIONAL BANK OF SARATOGA SPRINGS, N. Y., Appellant, Impleaded with WILLIAM B. GAGE and Others, Respondents.

Third Department, January 9, 1907.

Parties—joinder of plaintiffs by consent—motion by one plaintiff to bring in new defendant—protection of coplaintiff against costs.

When in a stockholder's action against the directors of a bank for malfeasance, a plaintiff has been brought in by consent of the parties, the intervening plaintiff is entitled to the same rights and privileges as the original plaintiff. Hence, when the intervening plaintiff moves to bring in a new defendant, which motion is opposed by the original plaintiff, the court in its discretion may decide between the conflicting interests of the coplaintiffs and bring in the defendant, if he is a proper party.

But under such circumstances the plaintiff who objects should be secured against costs if the defendant brought in be successful, and the moving party should be required to give a bond to indemnify him.

APPEAL by the plaintiff William R. Weed and by the defendant, The First National Bank of Saratoga Springs, N. Y., from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Saratoga on the 13th day of July, 1906, granting a motion made by the plaintiff Florence J. Steenburgh that Willard Lester be made a party defendant in this action.

Edgar T. Brackett [*Walter P. Butler* of counsel], for the appellant William R. Weed.

Clarence B. Kilmer [*Walter P. Butler* of counsel], for the appellant The First National Bank of Saratoga Springs.

Lewis E. Carr, for the respondent Florence J. Steenburgh.

John L. Henning [*Marcus T. Hun* of counsel], for the respondents William B. Gage and others.

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COCHRANE, J. :

The action was originally instituted by William R. Weed as sole plaintiff. Thereafter, Florence J. Steenburgh was, by order of the court on her own motion, permitted to intervene as a party plaintiff and to appear as such plaintiff by her attorney. Such order was granted without opposition, after notice to the original plaintiff Weed. From the papers used on the present motion it appears that it was made "upon the consent of the respective parties."

The propriety of such order, granted as it was without objection by the original plaintiff, cannot here be questioned. That such an order may lead to friction between plaintiffs as a result of their uncongeniality, or because of divergent motions as to the manner in which the litigation should be conducted, is demonstrated by the present controversy. It is also apparent that such a dual relationship of coplaintiffs may lead to confusion in practice worse founded. But those are arguments which should have been directed against the order of intervention. The status as a coplaintiff of the respondent Steenburgh having been judicially fixed with the practical consent of the original plaintiff, such intervening plaintiff is now entitled to the same rights, privileges and consideration to which she would be entitled had she jointly with the plaintiff Weed originally instituted the action with his consent and co-operation.

Viewed from this standpoint, the question as to the propriety of bringing in another person as a party defendant resolves itself into a proper exercise of discretion by the Special Term in an effort to subordinate as much as possible the internecine warfare between the coplaintiffs to their common interests, and to make such a disposition of the question as will best subserve those interests.

The plaintiffs as stockholders of the defendant bank seek to maintain the action for the benefit of the bank and all its stockholders to recover of certain directors of the bank for losses claimed to have been sustained by reason of their alleged negligence and malfeasance as such directors. The proposed defendant Lester was also a director, and is claimed by the plaintiff Steenburgh to be liable in this action. Hence this motion on the part of such plaintiff to bring in Lester as a defendant, which motion is resisted by the other plaintiff Weed.

The court will not on this motion consider whether a cause of

action exists against the proposed defendant. That question must be determined in the usual way after the action shall be at issue as to him. Suffice it to say that it may be desirable in the interests of the stockholders generally that Lester should be a defendant. On the other hand, it is not apparent how the plaintiff Weed can be prejudiced by the presence of Lester as a defendant, except by the possible contingency of costs in case Lester should be successful in the litigation. The discretion of the Special Term was not improperly exercised, except that the plaintiff Weed should have been protected against such costs. A plaintiff who seeks to force on his coplaintiff, against the protest of the latter, a litigation with a party not already identified with the action should be willing to assume responsibility for the costs of such litigation if unsuccessful.

The order should, therefore, be modified by requiring the respondent Steenburgh to give to the appellant Weed a bond to be approved by a justice of the Supreme Court, to protect said Weed against all costs which may be awarded in favor of the proposed defendant, and as thus modified affirmed, without costs. Unless the respondent Steenburgh complies with this modification within twenty days the order must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

All concurred, except SMITH, J., who voted for reversal; PARKER P. J., not sitting.

Order modified by requiring the respondent Steenburgh to give to appellant Weed a bond, to be approved by a justice of the Supreme Court, to protect said Weed against all costs which may be awarded in favor of the proposed defendant, and as thus modified affirmed, without costs. Unless the respondent Steenburgh complies with this modification within twenty days the order must be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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LUCIUS H. WASHBURN, Appellant, v. HARRIET D. GRAVES and
J. EDWARD POOLE, as Administrators, etc., of MARGARET KILBOURN,
Deceased, Respondents.

Third Department, January 9, 1907.

**Bill of particulars—counterclaim charging real estate agent with
making personal profit—particulars of counterclaim required.**

The plaintiff, an attorney at law, sued as assignee of a deceased attorney to recover moneys expended for the benefit of the client's real estate. As a counterclaim the defendants alleged that the plaintiff and his assignor were copartners and rendered services as agents in leasing real estate and collecting the rents, and that without authority had equipped portions of the realty with furniture and leased the same, and personally appropriated that portion of the rent coming from the lease of the furniture, etc. The plaintiff denied all knowledge of the matters alleged in said counterclaim and asked a bill of particulars thereof.

Held, that a bill of particulars should be required.

APPEAL by the plaintiff, Lucius H. Washburn, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 29th day of August, 1906, denying the plaintiff's motion for a bill of particulars.

The complaint, among other things, alleges that one Hiram L. Washburn, now deceased, who was an attorney and counselor at law, between January 3, 1902, and February 1, 1904, paid to Margaret Kilbourn, defendants' intestate, and disbursed for her benefit and for the benefit of her real estate \$2,567.90, which payments and disbursements with the respective dates thereof are fully set forth in an itemized schedule constituting a part of the complaint; that no part thereof has been paid except \$2,056.48, leaving due and owing from said Margaret Kilbourn \$511.42. The complaint also alleges the assignment to plaintiff, also an attorney and counselor at law, of the said cause of action by the personal representatives of said Hiram L. Washburn, deceased.

As a counterclaim to said cause of action the defendants allege that said Hiram L. Washburn and the plaintiff were copartners and

as such copartners rendered services as agents of said Margaret Kilbourn, deceased, in leasing her real estate and collecting and paying over rents, and that "said plaintiff and his said copartner, between the years 1900 and September 7, 1904, in violation of their contract with intestate and for their private advantage and gain, unknown to intestate, equipped or partially equipped portions of said realty and premises with household furniture and leased the same in connection with said premises and as a part thereof to divers persons upon an understanding with such persons that a portion of the rent paid was to be applied for the use of said furniture and the balance for the use of said premises; that in furtherance of said plan the sums so agreed upon as for use of said furniture were collected by plaintiff and his said copartner, or one of them, and applied to his or their personal profit, without the consent of intestate, to the damage and injury of the defendants' intestate in the sum of \$500.00," and also "that in furtherance of said plan for a personal and private gain in the leasing of said furniture, the plaintiff and his said copartner, or one of them, disposed of certain household furniture belonging to said intestate and located in said premises and under their charge, without the consent of the intestate, of the value of \$450.00 for the nominal sum of \$18.40, or thereabouts, to her damage \$431.60."

The plaintiff in his moving affidavit denies in detail all knowledge respecting any of the matters alleged in said counterclaim, and it appears from such affidavit that he is ignorant of all facts pertaining to the same. No opposing affidavits were submitted.

Plaintiff asked for a bill of particulars specifying "the particular articles of household furniture alleged to have been leased by plaintiff and his said copartner; the names of the persons it is claimed paid moneys pursuant to the alleged understanding that a portion of the rent was to be received for the use of said furniture, and the proportion or amount of the rent so applied, and of the amount of rent so alleged to have been collected, and the particular days and times of the collection or receipt of said alleged amount, and also the particular articles of household furniture alleged to have been sold as aforesaid, with the respective values of such articles, together with the day or days of such sale and the name or names of the person or persons to whom the same was sold."

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J. S. Frost [of counsel], for the appellant.*N. B. Spalding*, for the respondents.

COCHRANE, J.:

The counterclaim alleges deception, imposition and wrong dealing by plaintiff and his copartner for a period of nearly four years while acting in a fiduciary capacity for the defendants' intestate. These allegations are in the most general terms and convey very little, if any, information as to the precise facts constituting such malfeasance save the general statement thereof. Plaintiff in his reply and in the moving affidavit denies all knowledge concerning the same. His copartner, for whose misdeeds equally with his own he is sought to be held liable, is dead, and whatever information may have been possessed by the copartner is not available to plaintiff. Defendants do not plead their inability to furnish the desired particulars. In the absence of opposing affidavits it must be assumed that they can readily furnish the same. It may very well be that the instances of wrongdoing, if any, alleged in the counterclaim were committed by the deceased copartner of plaintiff without the knowledge of the latter, and the latter should be apprised in detail of the facts concerning the same which are within the defendants' knowledge. It would be manifestly unjust to require the plaintiff to go to trial on such sweeping and comprehensive charges of business obliquity and long-continued petrified integrity on the part of himself or his deceased copartner, without apprising him more fully of the nature of such charges. Justice and propriety require the defendants to comply with the plaintiff's demand for a bill of particulars. The particulars asked for amount to little more than a detailed description of the wrongful contracts which the defendants claim were made to the prejudice of their intestate. If those contracts were in writing and in defendants' possession plaintiff would clearly be entitled to copies thereof. Being oral it is equally proper that defendants should furnish detailed particulars concerning the same.

The order must be reversed, with ten dollars costs and disbursements, and the motion granted, without costs.

All concurred; PARKER, P. J., not sitting.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs.

MARGARET WELLS, Respondent, v. GLENS FALLS INSURANCE
COMPANY, Appellant.

Third Department, January 9, 1907.

Insurance — action on fire insurance policy — defense of breach of warranty in application — erroneous exclusion of evidence showing knowledge of danger from incendiarism.

When, in an application for fire insurance, the insured in answer to a question as to whether she had any reason to fear incendiarism answered no, and the defense in an action on the policy is that that representation was untrue, it is error to refuse to admit evidence to show that the husband of the insured prior to the insurance had told her about fires on the farm started by a particular person and had talked with her about fires from time to time. While such evidence might not be conclusive it is reversible error to exclude it as it bore directly on the issue.

APPEAL by the defendant, the Glens Falls Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of St. Lawrence on the 5th day of March, 1906, upon the decision of the court rendered after a trial at the St. Lawrence Trial Term, the case having been taken from the jury by consent at the close of the evidence.

Malby & Lucey [*D. B. Lucey* of counsel], for the appellant.

Willis J. Fletcher [*Ledyard P. Hale* of counsel], for the respondent.

COCHRANE, J.:

This is an action on a policy of fire insurance issued by the defendant May 21, 1902, covering a barn on plaintiff's farm in the town of Norfolk, St. Lawrence county, N. Y. The barn was destroyed by fire October 20, 1903. The defense is a breach of warranty in respect to representations concerning the subject-matter of the insurance made by plaintiff in her application therefor.

Plaintiff has owned the farm since the year 1880. Before that and before her marriage her husband resided thereon. All the time it was owned by his wife down to the time of the insurance in question he managed the farm for her as her agent. As such agent

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he made application for such insurance. He gave to the defendant's agent the information on which the policy was issued. From such information the latter wrote the answers to the questions in the blank form of the application used by the defendant. Such application when thus filled out was taken to the plaintiff by her husband, signed by her, and returned by mail to the defendant's agent. One of the questions contained in this application was, "Have you any reason to fear incendiarism?" It was answered negatively by the plaintiff.

The defendant was not permitted to show at the trial what the plaintiff's husband said to her shortly before this insurance with reference to fires which had been set on the farm by a particular individual who was named; nor to show by another witness that he had talked with plaintiff about fires from time to time in the last twenty years. It is impossible to tell to what this excluded testimony would have led. After the court had sustained objections to it the defendant was not required to persist in offering other testimony of the same kind. The orderly and seemly conduct of the trial required the defendant to desist once the court had clearly indicated that such testimony was inadmissible. While the excluded testimony might not have been conclusive or even important no such assumption can be made. It should have been admitted that its importance might have received due consideration.

Whether the plaintiff had reason to fear incendiarism was a material inquiry. If she had reason for such fear she had falsely answered an important question, had given the defendant inaccurate information, and her policy was unenforceable. The excluded testimony bore vitally on this issue and such exclusion constitutes reversible error. (*Donley v. Glens Falls Insurance Company*, 184 N. Y. 107.)

The judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred; PARKER, P. J., not sitting.

Judgment reversed and new trial granted, with costs to appellant to abide event.

In the Matter of the Application of WILLIAM C. TAYLOR, Appellant, for a Peremptory Writ of Mandamus Requiring the CITIZENS' NATIONAL BANK OF SARATOGA SPRINGS, N. Y., Respondent, to Allow an Inspection of Its Books and Records.

Third Department, January 9, 1907.

Corporation — mandamus by stockholder to obtain inspection of books — when writ refused.

A stockholder is entitled to mandamus to obtain an examination of the corporate books only when necessary in aid of his stock interests. But where the information is sought, not for the benefit of the stock interest, but to secure information in aid of a suit by a stockholder against directors personally for deceit and to recover damages sustained by reason of a false report published by them whereby he was induced to become a stockholder, the writ will be refused.

APPEAL by the petitioner, William C. Taylor, from an order of the Supreme Court, made at the Saratoga Special Term and entered in the office of the clerk of the county of Saratoga on the 30th day of December, 1905, denying the petitioner's application for a peremptory writ of mandamus.

Edgar T. Brackett, for the appellant.

Nash Rockwood, for the respondent.

Order affirmed, with costs, on the opinion of Mr. Justice HENRY T. KELLOGG at Special Term. All concurred; PARKER, P. J., not sitting.

The following is the opinion delivered at Special Term :

KELLOGG, J. :

This is an application for a writ of mandamus to compel the Citizens' National Bank of Saratoga Springs to exhibit its books and papers to William C. Taylor, a stockholder.

A stockholder may, for a proper purpose, obtain by a mandamus an examination of the corporate books. (*Matter of Steinway*, 159 N. Y. 250.) The writ will not be granted for the purpose of enabling a stockholder, by showing financial embarrassment, to

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force the corporation into the hands of a receiver through action by the Attorney-General. (*Matter of Pierson*, 44 App. Div. 215.) Nor to show an improper loan by its officers, in order to compel the parties to make good in case of a deficit. (*People ex rel. McElwee v. Produce Exchange Trust Co.*, 53 App. Div. 93.) Before a stockholder may have the writ, he must establish that "it is necessary for him to have the information in order to properly protect his interest in the corporation." (*Matter of Latimer*, 75 App. Div. 522.)

Thus it will be seen that the writ is granted only on behalf of a stockholder considered as such and in proper aid of his stock interest only. Wherever information concerning the management, conduct and control of the corporation is necessary for the protection of such stock interest its revelation will be compelled; but where the information is sought, not for the benefit of an owner's stock interest, but to assist him in matters personal to himself, and wholly apart from such interest, the writ should not be granted.

This applicant seeks information to aid him in a suit in deceit against three directors of a banking corporation, brought to recover damages sustained by reason of a false report published by them whereby he was induced to become a stockholder and incurred loss. Confessedly this is the purpose of the application. It is, therefore, not as a stockholder, but as a plaintiff in a suit against individuals not affecting the management, conduct or control of the corporation, that he demands this writ. It should be denied to him.

Motion denied, with costs.

JOHN CONNOR, Appellant, v. EDGAR W. PHILO, Respondent.

Third Department, January 18, 1907.

Trial—complaint stating action on contract and for conversion—proof of action on contract warrants recovery—Code Civil Procedure, section 549, subdivision 4, construed.

Where a complaint contains a statement of facts constituting an action upon contract which is sustained by proof at trial, a recovery is authorized although the complaint also contains allegations of tort.

Thus when the complaint sets out a contract of employment and a breach thereof by the defendant, and also that the defendant, as a contractor, was to receive

compensation under his contract and to pay labor from the proceeds and that the defendant refused and neglected to pay the plaintiff from the funds received but wrongfully converted and disposed of such funds to his own use. the plaintiff upon establishing the facts supporting the action for breach of contract is entitled to recover, even though there be insufficient proof of the allegations of conversion.

Subdivision 4 of section 549 of the Code of Civil Procedure, providing when in an action upon contract the complaint alleges fraud, the plaintiff cannot recover unless he prove the fraud on trial, does not apply to actions in Justices' Courts but relates only to actions in the Supreme Court, the City Court of the city of New York or to a County Court.

APPEAL by the plaintiff, John Connor, from a judgment of the County Court of Washington county, entered in the office of the clerk of said county on the 15th day of September, 1906, reversing a judgment of a justice of the peace of the town of Greenwich in favor of the plaintiff, entered on the 19th day of May, 1906.

The allegations of the complaint are as follows:

First. That the plaintiff was employed by the defendant, and rendered services for said defendant from the 30th day of September, 1901, to the 1st day of May, 1902, at the agreed compensation of \$1.25 per day; and that the defendant is justly indebted to said plaintiff in the sum of \$174.89 remaining unpaid and due to said plaintiff for said services, together with interest thereon at three per cent, amounting to \$195.89 in all.

Second. That during the time above mentioned defendant was under contract with the Salem Electric Light and Power Company, by the terms of which contract said defendant was to operate and to pay for the labor employed in the operation of the plant of said company, located at East Greenwich, N. Y., and was to receive as compensation and pay for said labor from the proceeds of the commercial or private lighting done by said company in the village of Salem, N. Y.; that the labor of plaintiff above described was performed for defendant upon the plant of said company and in the operation of said plant.

Third. That said defendant did receive the proceeds of said private or commercial lighting above mentioned as compensation for his services and for the payment of the services rendered by plaintiff to defendant as herein set forth; and that defendant has refused and neglected upon plaintiff's demand to pay plaintiff from

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the funds so received for the payment of said plaintiff, and has, being then in the possession of said funds for that purpose, wrongfully and unlawfully converted and disposed of said funds to his own use; that by reason of said wrongful acts of defendant the plaintiff has sustained damage in the sum of \$195.89.

Wherefore, plaintiff demands judgment against said defendant in the sum of \$195.89, together with the costs of this action.

On the trial in the Justice's Court the plaintiff recovered a judgment for the amount claimed. On appeal to the County Court this judgment was reversed, and from such judgment of reversal the plaintiff has appealed.

Erskine C. Rogers, for the appellant.

Robert N. Wilson, for the respondent.

CHESTER, J. :

The County Court was of the opinion that the trial in the Justice's Court had proceeded on the theory that the action was one for conversion and not upon a contract. If that supposition was correct the reversal was right, as no cause of action in tort was proven. But we are unable to see from this record that the action was tried solely as one for conversion. The complaint in the first paragraph states a complete cause of action upon contract. This cause of action was supported by sufficient proof upon the trial. It is true that in the other paragraphs of the complaint an attempt is made to state a cause of action in tort, and some proof upon the trial was given tending to support such a cause of action, but much proof that was apparently offered on that phase of the case was excluded by the justice, and there was a complete failure to prove a cause of action in tort. The action, therefore, appears to be clearly within that class of authorities which hold that where a complaint contains a statement of facts constituting a cause of action upon a contract which is sustained by proof, a recovery is authorized, although the complaint also contains allegations of a tort. (*Fowler v. Abrams*, 3 E. D. Smith, 1; *Conaughty v. Nichols*, 42 N. Y. 83; *Cohn v. Beckhart*, 63 Hun, 333; *Dodge v. Eckert*, 71 id. 257; *Town of Green Island v. Williams*, 79 App. Div. 260; *Booth v.*

Englert, 105 id. 284.) The allegations of tort in such cases are regarded as surplusage.

There having been the allegation and proof of a complete cause of action upon contract, entirely separate and distinct from the attempt to allege and prove a cause of action in tort, we think the judgment rendered by the justice was authorized and should not have been disturbed.

The provision of subdivision 4 of section 549 of the Code of Civil Procedure, cited by the respondent, has no bearing on the question, as that relates only to actions in the Supreme Court, the City Court of the city of New York or a County Court (Code Civ. Proc. § 3347, subds. 4, 5), and the trial here was in a Justice's Court.

The judgment of the County Court should be reversed and that of the Justice's Court affirmed, with costs in this court and in the County Court to the appellant.

All concurred ; PARKER, P. J., not sitting.

Judgment of County Court reversed and that of Justice's Court affirmed, with costs in this court and in the County Court to the appellant.

WILLIAM H. FULLER, Respondent, v. THE MUNICIPAL TELEGRAPH AND STOCK COMPANY, Appellant.

Third Department, January 18, 1907.

Gambling contract — fictitious transactions in stock — when purchaser entitled to recover moneys advanced — evidence of agency — agent as joint tortfeasor with principal — settlement of agent with customers — when assignee of claims so settled not entitled to recover.

When customers of an alleged broker have paid money as margins and commission for the purchase of stock in the actual belief that they were buying the same, they are entitled to recover the moneys advanced if no stock was actually bought or sold by the broker and the whole transaction was merely a matter of bookkeeping.

When it is a question as to whether the person with whom the orders for purchases and sales of stock were placed was the agent of the defendant operating a branch office in another locality, and it is shown that the moneys received from customers were deposited by the alleged agent to the credit of the defend-

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ant and that a portion of the commissions was paid to the agent "as his fee" for doing business, the agency is established and the defendant is liable.

But when it appears that the agent when ending his relations with the defendant transferred the accounts of certain customers without expense to other brokers, giving them a receipt from the new brokers, and when it also appears that the agent settled accounts with certain customers, such transactions are not effective to vest the agent or his assignee with title to the customers' claims against the defendant.

So, too, when a customer has been transferred by the agent to another company with his assent and without expense and has received from that company all the benefits that he would have received had the stock been purchased when the order was first given, he has suffered no damage and the transaction constituted an adjustment with one of the wrongdoers and bars an action against the other.

But customers who were charged new commissions by the agent for transferring them to the new company and who have received no moneys from that company, have not received satisfaction for the wrong done by the defendant in obtaining and holding their moneys.

Although the defendant's books show that its agent was indebted to it in a large sum on account of fictitious purchases made through the agent, such indebtedness is not available to the defendant as a counterclaim.

Extra allowance affirmed.

APPEAL by the defendant, The Municipal Telegraph and Stock Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Ulster on the 6th day of December, 1905, upon the report of a referee.

John A. Delehanty [*D. Cady Herrick* of counsel], for the appellant.

James Jenkins [*John A. Stephens* of counsel], for the respondent.

KELLOGG, J. :

The manner in which the business was transacted at the so-called broker's office at Rondout, and at the defendant's main office at Albany, is not materially different from that described in *Haight v. Haight & Freese Co.* (112 App. Div. 475) and *McCarthy v. Meaney* (183 N. Y. 190). Here there were no sales or purchases of stock pursuant to the orders of the various customers. The business of those offices, so far as the plaintiff and his assignors are concerned, was all on paper; they were simply bookkeepers and not stockbrokers. The plaintiff and his assignors actually intended to and believed they were buying and selling stocks, and were

paying their money on account of such supposed transactions. Otherwise the business was purely fictitious. The above cases show the liability of the defendant if it is established that Quincey, the person in charge of the Rondout office, represented the defendant so far as to make it liable for his acts in receiving the moneys of the plaintiff and his assignors and paying them over to it.

It is unnecessary to discuss all the evidence bearing upon the question of the liability of the defendant for Quincey's acts. Among other things, the evidence tended to show that the moneys received from the plaintiff and other customers were deposited by Quincey in the bank to the credit of defendant; that a part of said moneys consisted of a commission of one-fourth of one per cent on the par value of the stock for buying and selling the stock, and that the defendant agreed to pay Quincey one-half of that commission "as his fee" for doing the business. There was sufficient evidence to justify the findings that the defendant is liable for the moneys received at the Rondout office.

The complaint proceeds upon the theory that the plaintiff and his assignors paid money into the Rondout office as margins and commissions for stocks which they directed to be bought and which stocks were wrongfully reported as bought; that the stocks were not bought, and that the transaction, so far as the defendant was concerned, was simply to receive the money on account of a series of fictitious entries upon its books, and that having failed to perform its contract the defendant is liable to the plaintiff for the moneys received, with interest thereon.

Among the claims upon which recovery was had were the Rafferty claim of \$1,038.88 and the Hiltebrant claim of \$253.68. The plaintiff cannot recover upon either of these claims. When customers "bought" stocks at the Rondout office, Quincey, the manager, gave them a slip stating that he had bought the stock in his name for their account. When he closed his relations with the defendant he put one of these customers, without expense to him, in the Metropolitan Stock Exchange in Boston for the same stocks, giving him a ticket with that company and receiving back the Quincey ticket. The other customer, when Quincey closed his relations with the defendant, offered to settle with him for a small amount and he paid it, and received the slip previously given. These facts consti-

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tute the alleged assignment of these claims. It is evident that the business as conducted by Quincey and the defendant with reference to the plaintiff and his assignors was illegal and both Quincey and defendant were liable for the wrongful acts. There can be no real question that Quincey knew the manner in which the defendant carried on its business and that the transactions so far as he and the defendants were concerned were purely bogus and existed only on paper. Therefore, when he substituted one company for the other and paid one customer a small amount, it must be deemed that he was settling with his victim for the wrong done. By such settlement he obtained no title to any claim against the defendant. Quincey could not recover from the defendant, and his alleged assignee is in no better position.

One Wolff had paid into the Rondout office \$770 margin on account of the purchase of stocks. Quincey, when he closed his relations with the defendant, transferred Wolff's account to the Metropolitan Company and he was carried with the Metropolitan Company for several weeks for the same stocks without expense to him, and the transaction was then closed and Wolff was paid \$1,100. In fact he received from Quincey \$1,100 on account of the \$770 which he had paid to Quincey and on account of the same transactions. After Wolff was transferred to the Metropolitan Company he was informed of the fact by Quincey and assented to it. So far as Wolff is concerned this may fairly be treated as one transaction.

It does not appear whether the transaction between Quincey and the Metropolitan Company was an actual purchase of the stock or only a fictitious paper transaction. However that may be, Wolff received the same advantages from it that he would have received if Quincey had purchased the stock when the order was first given and when he was representing the defendant. It does not, therefore, seem that Wolff has suffered any damage by reason of the fact that Quincey and the defendant did not in the first instance purchase the stock. It is true the defendant still holds his money without consideration. But it received it under such circumstances that both it and Quincey were liable for it, and Quincey, one of the wrongdoers, reinstated the purchase and procured for Wolff all the benefits intended. He received every benefit an actual purchase of the stock could have brought him. That was in fact an adjustment by

one of the wrongdoers for the wrong done, and after having had full satisfaction, Wolff, or his assignee, cannot now proceed against the other wrongdoer. If Quincey had remained the representative of the defendant when the \$1,100 was paid to Wolff, it is evident that with the \$1,100 in his pocket Wolff could not recover of the defendant the \$770 which it had received. It is also clear that if an action had been brought against Quincey after this account was transferred to the Metropolitan Company, the transfer and the receipt by the plaintiff of the profits of the transaction, larger than the original investment, would be a defense so far as Quincey is concerned. If a defense to Quincey it would seem to be a defense to the defendant, who was apparently a conspirator with him in obtaining the plaintiff's money.

When Quincey closed his relations with the plaintiff several other assignors of the plaintiff transferred their accounts to the Metropolitan Company through Quincey, but they either paid the regular commission or it does not appear how they were reinstated, and it appears that no moneys were received by them from the Metropolitan Company; and, therefore, as to those various claims, it cannot be said that the parties have received any satisfaction on account of the wrong done by the defendant in obtaining and withholding their moneys.

Prior to the times mentioned in the complaint, and at the time of the Northern Pacific corner, the sudden drop in the market resulted in entries upon defendant's books tending to show that Quincey was indebted to it in a large sum, which indebtedness was on account of purchases made by the assignors through Quincey, and these paper transactions are now urged by the defendant as a counterclaim. It is evident that if defendant is liable for a return of the margins on account of the manner in which it did its business, it could have no legal claim for non-payment of margins on similar transactions. It is unnecessary, therefore, to consider the evidence which tends to show that the defendant, to induce the assignors to continue doing business with the Rondout office, agreed to wipe the slate and start anew. The defendant, therefore, had no counterclaim.

The case is a long and complicated one, difficult and extraordinary, and the discretion of the Special Term granting an additional allowance of costs was properly exercised.

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The judgment, therefore, is reversed upon the law and the facts, and the referee discharged and a new trial granted, with costs to the appellant to abide the event, unless plaintiff within twenty days from entry of order stipulates to modify the judgment by deducting therefrom the amount recovered on account of the Rafferty claim, the Hiltebrant claim and the Wolff claim. In case of such stipulation the judgment is so modified, and as modified is affirmed, without costs. The order appealed from is affirmed, without costs.

All concurred ; PARKER, P. J., not sitting.

Judgment reversed upon law and facts, referee discharged and new trial granted, with costs to appellant to abide event, unless the plaintiff, within twenty days from the entry of order, stipulates to have the judgment modified as per opinion. In case of such stipulation judgment is so modified, and as modified unanimously affirmed, without costs. Order appealed from affirmed, without costs.

In the Matter of the Application for Letters of Administration
with the Will Annexed of HENRY A. SHELDON, Deceased.

Third Department, January 18, 1907.

Practice — undertaking on appeal from Surrogate's Court — no exception to sureties after approval by surrogate — power of Appellate Division to perfect appeal.

An undertaking given under sections 2577 and 2581 of the Code of Civil Procedure on an appeal to the Appellate Division from a decree or order of the surrogate is not governed by section 1335 of the Code of Civil Procedure providing for the justification of sureties. Such latter section relates only to appeals to the Court of Appeals and is not applicable to the Surrogate's Court. Hence, when such undertaking has been filed with the surrogate and has been allowed and approved by him, an exception to the sureties is not well taken, and a motion to perfect an appeal under section 1308 of the Code of Civil Procedure will be dismissed.

The remedy, if sureties are insufficient or become insolvent, is to apply for an order requiring a new bond or undertaking or additional securities as the case may require.

It is within the discretion of the surrogate whether he will determine the sufficiency of sureties from their affidavits of justification or will require the

sureties to attend and be examined before approving the undertaking. He may establish rules to regulate the justification of sureties in his own court. The Appellate Division has power to permit an appellant from the Surrogate's Court to file a new undertaking or do any other act necessary to perfect an appeal.

MOTION to perfect an appeal.

Taylor L. Arms, for the appellant.

Isaac Weill, for the respondent.

SEWELL, J. :

This is an application to perfect an appeal under section 1303 of the Code of Civil Procedure. The decree or order from which the appeal was taken was entered in Surrogate's Court October 18, 1906. The notice of appeal was duly served, and an undertaking approved by the surrogate, with the approval indorsed thereon, was filed in the surrogate's office October 22, 1906. The undertaking was executed in conformity with the provisions of sections 2577 and 2581 of the Code, which prescribe the form of an undertaking to perfect an appeal from Surrogates' Courts, and accompanying it was an affidavit of each surety to the effect that he was a resident of and freeholder within the State, and worth twice the sum specified in the undertaking, over and above all his debts and liabilities and exclusive of property exempt by law from levy and sale under an execution. On November 1, 1906, the respondent's attorney caused a notice of exception to the sureties to be served on the appellant's attorney, who thereupon made a motion to set aside the exception. The motion was denied by the surrogate on the ninth day of November, and as the appellant could not then cause the sureties to justify before the surrogate within ten days after the notice of exception, and the respondent claimed the undertaking was not effectual for any purpose, application is made to perfect the appeal by filing another undertaking.

There is no force in the contention of the respondent, that this court has not the power to permit an appellant to file a new undertaking, or to do any other act necessary to perfect an appeal from Surrogate's Court. That power is expressly given by section 1303 of the Code of Civil Procedure to the court, "in or to which the appeal is taken," and that section is made applicable to appeals from Surrogates' Courts by section 2575 of the Code.

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We can find, however, no authority for the assumption of counsel, that the filing of the undertaking already given, and the service of the notice of appeal, did not perfect the appeal herein.

Section 1335 of the Code, which provides for the justification of the sureties in an undertaking given to perfect an appeal within a certain time after notice of filing and exception thereto, relates to appeals to the Court of Appeals and has not been made applicable to appeals from Surrogates' Courts.

There is no provision in chapter 18 of the Code, which provides a complete system of appeals from orders and decrees made in Surrogates' Courts, altogether distinct from the provisions in reference to appeals from other courts, nor is there included within any section of the Code, made applicable to proceedings in Surrogates' Courts, a provision which requires the sureties in an undertaking or bond, given to perfect an appeal or for any other purpose, to attend before the surrogate within a certain time and be examined as to their sufficiency.

From the absence of such a provision, it would seem that the Legislature intended to dispense with that proceeding in respect to all bonds and undertakings required to be given in Surrogates' Courts, and that the sufficiency of the sureties therein should be determined from the affidavits of justification which must accompany such instruments and be subjoined thereto. (Code Civ. Proc. § 812.)

That such was the intention of the Legislature is also apparent from the fact that express provision is made in that chapter for an *ex parte* approval of all bonds and undertakings prescribed therein, and the approval is made conclusive proof of the sufficiency of the sureties, in that the only remedy reserved to a respondent or other person interested, if the sureties are insufficient or become insolvent, is to apply for an order requiring a new bond or undertaking or new or additional sureties as the case may require. (Code Civ. Proc. §§ 1308, 2575, 2597.)

There is no intimation of a justification or an allowance of sureties after the undertaking has been approved and filed in the surrogate's office. On the contrary, there is a plain and explicit declaration in section 2581 of the Code that "the filing of a proper undertaking and service of the notice of appeal, perfect the appeal."

That was the substance and effect of the provisions of the Revised Statutes relating to appeal from Surrogates' Courts, from which this section was taken. (2 R. S. 66, § 56; Id. 610, § 108.)

It is a matter in the discretion of the surrogate whether he will determine the sufficiency of the sureties from the affidavits of justification, or whether he will require the sureties to attend before him and be examined touching their sufficiency, before approving of the undertaking. He may establish a rule to regulate the justification of sureties in his own court, and make a compliance therewith a condition of his approval, as the surrogates of the county of New York have done (Surrogate's Rules, 16, 17); but after he has approved of an undertaking and indorsed his approval thereon, it is all the Code requires. There is, then, a strict compliance with its provisions, and the undertaking is effectual for all the purposes for which it is required.

Obviously, therefore, the appeal herein was perfected when the appellant served her notice of appeal and filed the undertaking in the surrogate's office, and for that reason the application is denied, without costs.

All concurred.

Motion denied, without costs.

In the Matter of the Appraisal of the Estate of JOHN PALMER Deceased, under the Acts in Relation to the Taxable Transfers of Property.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; RUFUS K. PALMER and Others, as Executors, etc., of JOHN PALMER, Deceased, Respondents.

Third Department, January 18, 1907.

Tax — gift of property to son on condition that he provide for donor's family — when transfer made in contemplation of death.

The decedent, being ill of a lingering disease which affected both mind and body, about three months prior to his death made an assignment of all his property to a son, said assignment being attached to a schedule and reciting that the son has "absolute control of the assets herein named." The son

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deposited the securities assigned in a safe deposit in the name of three trustees, one of whom was himself, the other two being the persons named as executors of the father's will. In a proceeding to assess a transfer tax the son testified that it was mutually understood that he should look after the welfare of his mother, brother and sister in the same manner as the decedent had always done, and as a matter of fact the securities after the donor's death were divided among his wife and children by the trustees. The decedent also transferred savings bank accounts so as to stand in his own name and that of his son "payable to either or the survivor of either." The son in making affidavit to the amount of the estate in the matter of the collection of an inheritance tax at first included the savings bank accounts, but thereafter maintained that they were included in ignorance of his legal right thereto. Upon all the evidence, *Held*, that the gift was in trust for the benefit of the widow and next of kin of the donor and was not a trust for the benefit of the donor or a gift absolute to the son;

That the disposition of the property was clearly made in contemplation of death and subject to a transfer tax;

That under the statute, as amended, gifts *inter vivos* if made in contemplation of death are subject to a transfer tax, the tax not being restricted to gifts *causa mortis*;

That as attempts to evade the payment of a transfer tax are usually secret, circumstantial evidence may be sufficient to overbear the positive testimony of interested parties as to the intention of a disposition of the property.

(Per COCHRANE and KELLOGG, JJ.): Under the circumstances it is not necessary to hold that the alleged gift was made in contemplation of death. The purpose of the disposition was to relieve the owner from the care and management of his property without divesting him of title thereto and hence the property passed under the will of the decedent and was taxable.

CHESTER, J., dissented.

APPEAL by the Comptroller of the State of New York from an order of the Surrogate's Court of the county of Albany, entered in said Surrogate's Court on the 20th day of July, 1906, affirming an order entered in said Surrogate's Court on the 16th day of April, 1906, fixing and assessing a tax upon the transfers of property of John Palmer, deceased, under the law relating to taxable transfers of property.

John Palmer, of Albany, died upon the 15th day of April, 1905, at the age of sixty-two years. He had been in the War of the Rebellion, and from injuries received in said war he had gradually developed a disease known as multiple neuritis, which was the final cause of his death. About eighteen months prior to his death his mind began to weaken, and about December 1, 1903, he went to a

sanitarium at New York for treatment, and there he remained about six weeks. He then returned to his home in Albany, where he remained until he died. During the year 1904 he was somewhat improved, and in the summer of 1904 he was in sufficiently good health to go out driving every day. It was difficult for him to walk, but he was not confined to his bed. While the doctor feared that his mental faculties would gradually weaken, and his mind perhaps give way entirely, he thought his physical powers would remain sufficiently unimpaired to allow him to live considerable time, and, perhaps, several years. In the month of January, 1905, he seemed to be considerably improved and in fair condition, both mental and physical, though it was apparent that he was gradually weakening both physically and mentally. This was one of his best months since his return from the sanitarium. Upon the 10th day of January, 1905, he made, without consideration, an assignment of all of his property to his son, Rufus King Palmer. The assignment was in this form:

"John Palmer, Senior, residing at 728 Madison avenue, Albany, N. Y., declares that this is a schedule of his assets alphabetically arranged and assigned to his son, Rufus King Palmer, and that the said Rufus King Palmer has absolute control of the assets herein named.

JOHN PALMER."

The book with this assignment attached was delivered to Rufus Palmer. No counsel was called in, and the instrument was written out by the decedent personally. Rufus Palmer swears that at no time was anything said about the transfer tax or evading the transfer tax. Rufus was the eldest son of the decedent, and for a period of fifteen years Rufus has had from his father a general power of attorney. At the time of the transfer to Rufus he swears that it was mutually understood, although there was no actual agreement to that effect, that Rufus should properly look after the welfare of the mother, brother and sister, and also said decedent *in the same manner as said decedent had always done.*

Upon the fourteenth of February following this assignment Rufus took most of the property assigned from his father's box and put it in a box to be held in the name of three trustees, himself, William S. Hackett and Edward G. Sherley, with provision that

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this box should only be opened in the presence of two of said trustees. These trustees were the same persons mentioned in his father's will as executors and trustees. A small part of the securities in his father's box, to wit, the sum of \$15,000 or \$20,000 he allowed to remain in the box, claiming that he did not accept those, and the value of those securities has been inventoried as part of his father's estate. On the eighth day of March, at his father's request, some slips were given to him, and he directed the transfer of the bank accounts in three several banks to be transferred to an account in the name of "John Palmer or Rufus K. Palmer, payable to either or survivor of either." From the securities transferred upon March tenth no moneys ever came back to the possession of John Palmer. They were all collected by the trustees and paid over, a part to Mrs. Palmer, the wife of John Palmer, and the remainder divided among the children of John Palmer. The same proceeding was had after the death of John Palmer, at which time the balance of the property was placed in this trustee box, subject to the control of the three trustees. Upon January tenth, when the assignment was made, John Palmer, while a good deal crippled, did not expect to die at once, and was even talking about taking a trip to Europe in the spring. He stated to one of his trustees that the management of his property was getting to be a burden to him and he had every confidence in his son Rufus to whom he afterwards made the assignment. After the death of John Palmer Rufus Palmer made an affidavit in the matter of the collection of the inheritance tax, in which he stated that the property of John Palmer amounted to \$84,000. This included some \$64,000 which was contained in the three bank accounts which were then in the name of John Palmer or Rufus Palmer, as before specified. He afterwards explained that he made this affidavit without discussing the facts with his counsel and understanding that the peculiar situation of those accounts made them estate property notwithstanding the assignment to himself, but that after discussing the facts with his counsel he had discovered that he was the absolute owner in law and that the said \$64,000 should not be included in his father's estate. Upon these facts the surrogate has held exempt from taxation all the property transferred to Rufus by the assignment of January 10, 1905, including the funds in the three bank accounts which were

afterwards placed in the name of John Palmer or Rufus Palmer. The report of the appraiser was confirmed *pro forma* and upon appeal the *pro forma* decree was affirmed, and from the order or decree of affirmance the Comptroller has taken this appeal. Further facts appear in the opinion.

George J. Hatt, 2d, for the appellant.

Melvin T. Bender and Harold J. Hinman, for the respondents.

SMITH, J. :

That Rufus King Palmer took the property under this assignment for the purpose of passing the property to the widow and children of John Palmer in precise accordance with the plan of distribution in the will of John Palmer seems to me of irresistible inference. With a widow, two sons and a daughter, John Palmer never gave that property absolutely to his son Rufus. Moreover, Rufus swears upon the stand that there was an understanding which he does not admit amounted to an agreement that he would take care of his mother, brother and sister "in the same manner as * * * decedent had always done." From the date of the transfer upon January tenth until the time of John Palmer's death not one act of Rufus in the handling of this property is that of an independent owner. On the contrary, every act is in accord with the recognition on his part that the property was his father's and that the transfer was simply a means to accomplish the passing of the property to his father's heirs. The bank accounts remained in the name of his father until his father directed Rufus to give to him a bank slip upon which he directed the accounts to be transferred to "John Palmer or Rufus K. Palmer, payable to either or survivor of either." This fact of itself is not without significance of the fact that the act was done "in contemplation of * * * death." The securities of the deceased were not changed from the safe deposit box of John Palmer until they were put into a safe deposit box in the name of Rufus Palmer, William S. Hackett and Edward G. Sherley, who happened to be the trustees named in the will of John Palmer. These securities were put in this safe deposit box under the condition that they could be drawn, not by Rufus alone, but only by two of the three trustees. The exact nature of that trust

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is not shown. Upon this point the son Rufus is evasive. If he made the trust of his own volition it is inconceivable that he should be unable to state its exact terms. If the trust were, however, for the purpose of carrying out the provisions of the will of John Palmer there is good reason why the exact terms of the trust should not here be shown and the respondents are the only ones who have the power of showing by direct evidence just the extent and nature of that trust. After the death of his father the remaining securities belonging to the estate were placed in the same trust box although they must be administered under the direction of the trust contained in the will. Again, all income collected from securities was divided by Rufus between his mother, his brother and sister, and himself, as is evident, under his father's direction either under the terms upon which he originally took the property or at the time of the collection of the moneys. After the death of John Palmer Rufus Palmer makes affidavit in which he states that the property of his father amounts to \$84,000 which includes these three bank accounts which had been placed by direction of his father in the name of his father and himself "Payable to either or survivor of either." The inconsistency of the position that these bank accounts belonged to the father and that the rest of the property was his absolute property did not appear so clearly to Rufus as it did afterwards to his counsel who advised him that the property under the assignment was all his property except the small amount which he did not accept and remove from his father's safe deposit box.

It may be that John Palmer was not anticipating immediate death. He had been sick, however, for many years and for the last fourteen months prior to the making of this assignment he had been much worse. His mind was affected and his physical infirmity increased. That he was contemplating the contingency of death when he made this transfer seems to me undoubted. The absolute transfer with the secret trust, the apparent subsequent direction by him of the estate, the grasp that he still held upon the bank accounts, the transfer of the securities to the same trustees designated in his will before his death, pass beyond suspicion and point unerringly to an intent upon his part to provide for the passing of his estate after he was gone. The only reason assigned by these respondents for this transfer is that the estate had become a burden

upon him and as he had full confidence in Rufus he wanted to pass it over to his hands. This reason, however, has little weight when it appears that for fifteen years the son Rufus in whom he had so great confidence held a general power of attorney and could with equal force have accomplished his purposes under that power of attorney as under the formal assignment made. If this order of the surrogate stands, a man facing death has by indirection bequeathed his property and evaded payment of his share of the burden of taxation. As against just such transfers, as I understand, the Legislature intended to provide when it declared subject to taxation transfers made in contemplation of death.

The respondents urge certain legal objections to a construction of this gift as made in contemplation of death. That the gift was in form *inter vivos* rather than *causa mortis* is clearly shown. The delivery of the inventory with the assignment thereupon was a sufficient delivery to complete the gift. That the gift was in trust and not to Rufus absolutely would be held by any court, ~~where~~soever the question should arise, upon the testimony of Rufus himself and upon his subsequent conduct, which gives color to the motive of the gift. That trust, however, was not a trust for John Palmer so much as it was a trust for his widow and next of kin and, therefore, that trust does not come within the condemnation of the trust in the case of *Matter of Cornell* (170 N. Y. 423) or the case of *Matter of Brandreth* (169 id. 437).

It is strenuously urged, however, that this expression "in contemplation of * * * death" under the authorities refers simply to a gift *causa mortis* and does not include a gift *inter vivos*. This contention is not unsupported by authority. Such a construction was given to the phrase in *Matter of Seaman* (147 N. Y. 76, 77). In that case, however, the question did not arise in the same way as it is here presented. It was not necessary there to decide that a gift *inter vivos* made before death and for the purpose of avoiding the payment of this tax would not be a gift in contemplation of death. In *Matter of Edgerton* (35 App. Div. 125), MERWIN, J., in our own court seems in part to recognize this as the rule of law. Other cases in the Appellate Division may be cited where, in the prevailing opinion, this rule of construction is in part relied upon, which have been affirmed in the Court of Appeals without opinion.

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but the affirmance in the Court of Appeals was not in any case a necessary approval of this construction of the statute.

On the other hand, in *Matter of Cornell*, decided in this court and reported in 66 Appellate Division, 169, Mr. Justice CHASE, in writing for the court, says: "If a transfer of property is made for the purpose of cheating the law and avoiding payment of the transfer tax, it may well be that a gift so made, although absolute and unconditional, is made in contemplation of death, and that a tax should be paid thereon although the grantor, vendor or donor may live for many years thereafter, but with such exception the rule fairly to be deduced from all the authorities is that the words 'in contemplation of the death' refer to a gift *causa mortis*." While this decision was reversed the construction of the statute thus given was not overruled. Under chapter 713 of the Laws of 1887 (amdg. Laws of 1885, chap. 483) the language of the statute (§ 1) provided for the taxation of gifts "intended to take effect * * * after * * * death." This language was construed in *Matter of Edwards* (85 Hun, 436) to include gifts *causa mortis*. In 1891, however, the statute was amended to make subject to the tax also transfers "made in contemplation of * * * death." (Laws of 1891, chap. 215, amdg. Laws of 1885, chap. 483, § 1, as amd. by Laws of 1887, chap. 713.) If, under the act of 1887, gifts *causa mortis* were taxable, it would seem that the amendment of 1891 intended to add something to the statute. To hold that that refers alone to gifts *causa mortis* would be to hold that such amendment was surplusage and added nothing. This is the view taken of the statute in *Matter of Birdsall* (22 Misc. Rep. 180), wherein Surrogate WOODBURY holds that a gift *inter vivos* made for the purpose of avoiding the tax was taxable under the statute. (See Laws of 1892, chap. 169, amdg. Laws of 1885, chap. 483, § 1, as amd. *supra*, and Laws of 1892, chap. 399, § 1, subd. 3.)* This decision was affirmed in the fourth department in 43 Appellate Division, 624. The authorities in this State upon this question are not entirely satisfactory. In Illinois, however, a similar statute has been construed and the phrase "in contemplation of death" has been clearly interpreted. In *Rosenthal v. People* (211 Ill. 309), Mr. Justice CARTWRIGHT, in writing the opinion of

* These statutes were revised in Tax Law (Laws of 1896, chap. 908) § 220, subd. 3, as amd. by Laws of 1897, chap. 284. — [REP.]

the court, says: "A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event is within the language of the statute. With that understanding of the law there is no doubt that the gift in this case was made in contemplation of death. The preparation of the will under the circumstances, and in view of the rapid progress of the disease, is strong evidence that death was expected, and no other moving cause than the expectation of death is apparent. While the widow and physician testified that the deceased did not expect to die, they also said that it was not the subject of conversation at all, and in view of his condition it is a fair inference that he was not so dull of comprehension as to suppose that he would get well." In that case a gift *inter vivos* was held taxable. The same rule is held in *Estate of Merrifield v. People* (212 Ill. 405), where Mr. Justice HAND writes: "It is said, however, by appellants, that a transfer of property made without consideration, in contemplation of death, is a gift *causa mortis*, and that the stipulation is that the gift was absolute, hence it could not be a gift *causa mortis*, as a gift *causa mortis* is conditioned upon the death of the donor. A gift *causa mortis*, strictly speaking, applies only to personal property, and the gift is defeated if the donor recovers. In this case the subject-matter of the transfers was both real and personal property, and the transfers were absolute, and not upon the condition that they should be revocable in case of the recovery of the donor. They were, however, made in contemplation of his death. They fall, therefore, more nearly within the description gifts *inter vivos* made in contemplation of death, than within the designation gifts *causa mortis*."

Finally, the respondents contend that the burden of proof is with the Comptroller to show that this gift was made in contemplation of death and that the only positive evidence is to the contrary. Efforts to evade the law are secret and not public. Witnesses are not called in to attest them. The evidence to prove the same must of necessity be circumstantial rather than direct and such circumstantial evidence may overbear the positive testimony of an interested party who swears to the contrary. The effect of this transfer is to pass the property to the next of kin of the deceased exactly as it would have passed by will had this transfer not been before made. There

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is no moral reason why this property should not be taxed as though the property had passed three months later by the will of the deceased. Courts should not be over zealous to protect an estate from taxation and to shield parties by a presumption of innocence where no other rational motive for a transfer is shown, and no reason appears why the estate itself should not bear its just proportion of the public burden. The final order or decree of the surrogate should be reversed on the law and facts, and the matter be remitted to the surrogate for disposition in accordance herewith.

KELLOGG and COCHRANE, JJ., concurred in result; CHESTER, J., dissented; PARKER, P. J., not sitting.

COCHRANE, J. (concurring):

I concur in the result. I do not think, however, that it is necessary to hold that the transfer in question was made "in contemplation of * * * death" within the meaning of the Tax Law. But it is quite clear to me that under the instrument of January 10, 1905, Rufus King Palmer, the son of the decedent, took no title to the property therein mentioned. The transaction in form was sufficient to constitute a gift *inter vivos*. But the law penetrates beneath the surface of a transaction and considers not its form but its purpose. That purpose is correctly indicated by Rufus himself in the following language in his affidavit taken before the appraiser and used as evidence in this proceeding, viz.: "To relieve himself of the burden of his estate in view of his illness and through fear that his illness might be a lingering one, attended by weakened mental capacity which might incapacitate him to look after his own and his family's welfare, all of which was so expressed to deponent by said decedent, said decedent desired to and did transfer to deponent all of his personal property absolutely on or about the 10th day of January, 1905." The evidence clearly shows that Rufus was to be the custodian or manager of the property and that the transfer to him although absolute in form was merely for the accomplishment of such purpose. He was already acting under a power of attorney. It taxes human credulity to the utmost to suppose that General Palmer intended to make a gift of this large proportion of his property to one son to the exclusion of his widow and his other

children. Such an inference is inconsistent with the provisions of his will ratified by a codicil made only four months prior to the instrument of January, 1905, in which no such purpose is disclosed. It is also inconsistent with every act of Rufus after the transfer both before and after his father's death, which acts are confirmatory of the provisions of the will in respect to the disposition of the estate. Rufus would find it extremely difficult under the evidence before us to maintain his title to the property against the testamentary provisions of his father. It is unnecessary to give rein to the imagination to reach the conclusion that a gift was not intended. It requires an extremely lively imagination to reach the contrary conclusion. The deceased did not intend to exclude his family from participation in his estate and make them dependent on the bounty or liberality of one member thereof. Having due regard to the form of the transaction nevertheless the actual purpose thereof, as clearly indicated by the evidence, was to relieve the owner of the property from the care and management thereof without divesting himself of the title thereto. Such property, therefore, passed under the will of the deceased and is subject to the tax.

KELLOGG, J., concurred.

Order or decree of surrogate reversed on law and facts, and matter remitted to the surrogate for further disposition, without costs.

THE NATIONAL BANK OF NEWPORT, Respondent, v. H. P. SNYDER
MANUFACTURING COMPANY, Appellant.

Fourth Department, January 23, 1907.

Bills and notes — when question as to whether note was made for accommodation should not be submitted to jury — manufacturing corporation cannot become accommodation party — burden of proof as to good faith of holder.

When in an action upon a promissory note it is shown without dispute that the defendant, a manufacturing corporation, made a note for the accommodation of the payee, another corporation, and that the notes were renewed from time to time by the payee, which always paid the discount, the defendant is entitled to a ruling that the paper is an accommodation paper within the terms of the

Negotiable Instruments Law, and it is error to submit that question to the jury.

When in an action against a manufacturing corporation, as maker of a note, it is established that the note was made for the accommodation of another, the holder's right to recover depends upon whether it was aware of the vice in the note.

When an individual signs a note as an accommodation maker or indorser for the benefit of another he is liable to a subsequent holder for value although the holder knew him to be an accommodation party. But this rule does not hold in the case of a manufacturing corporation which has no power to bind itself as an accommodation party. Hence, in an action against a manufacturing corporation, which is conceded to be an accommodation maker, it is error to charge that the burden is upon the defendant to prove that the plaintiff knew or had reason to suspect that the note was an accommodation paper. Under such circumstances it is upon the holder to establish the *bona fides* of the transaction.

APPEAL by the defendant, the H. P. Snyder Manufacturing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Herkimer on the 19th day of January, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 2d day of January, 1906, denying the defendant's motion for a new trial made upon the minutes.

Myron G. Bronner, for the appellant.

Robert Forsyth Little, for the respondent.

SPRING, J. :

The action is upon a promissory note for \$5,000 purporting to be executed by the defendant, a domestic corporation, with its place of business in the city of Little Falls, in the county of Herkimer. The note was made payable to the order of the Newport Knitting Company, another manufacturing corporation located at Newport, in said county, and, as it is claimed, negotiated by it and for its benefit with the plaintiff.

Upon a prior appeal (107 App. Div. 95) a new trial was granted for errors in the exclusion of evidence tendered on behalf of the defendant.

In 1901 the bank held four notes, of \$5,000 each, which it had received from the Newport Knitting Company. One of these notes was executed by Homer P. Snyder, who was a director in both of

these corporations, and in fact three men — Sheard, Snyder and Senior — composed the majority of the directorate of each company. The bank examiner had censured the plaintiff for continuing these four notes which it held, and its cashier, in a conversation with Mr. Senior, requested that the note executed by Homer P. Snyder either be paid at maturity or that commercial paper be substituted in its place. Mr. Senior, thereupon, promised to take up the note and present in its place the note of the defendant, which the plaintiff agreed to accept, and this was done. The note was carried along by renewals until July, 1903, when the one in suit was given, which is the last of the series.

The evidence shows, without dispute, that the defendant received nothing whatever for this note, or any of the series. It became maker to accommodate the payee, the Newport Knitting Company, and the notes were renewed along from time to time at the instance of the payee, and the discount was always paid by it. The defendant, therefore, was entitled to the ruling that the note was accommodation paper within the terms of the Negotiable Instruments Law (Laws of 1897, chap. 612, § 55, as amd. by Laws of 1898, chap. 336.)

The court permitted the jury to determine whether the note was for the accommodation of the knitting company against the protest and exception of the defendant, and this submission to the jury constituted reversible error.

We start, therefore, with the fact established that the note is accommodation paper, and the other element necessary to a recovery is to prove that the plaintiff was not aware of the vice in the note. If the story of Mr. Senior is correct, the plaintiff knew that when the first of the series of the notes, of which the note in suit was one, was accepted by it, the real party in interest was still the Newport Knitting Company, and this was corroborated to some extent by the fact that the payee continued to pay the discount on this list of notes the same as upon the one for which it was a substitute and the others composing the \$20,000 liability. Mr. Wooster, the cashier of the plaintiff, in his narration of the conversation with Mr. Senior, testified to facts indicating that the plaintiff believed that the note was ordinary commercial paper owned by the knitting company, which is now insolvent, and this controversy made the

vital question of fact the good faith of the plaintiff in accepting the note.

In submitting this question to the jury the court said that the burden was upon the defendant to prove that the plaintiff knew or had reason to suspect that the note was accommodation paper when it accepted it. In other words, that the burden was upon the defendant to prove this fact to the satisfaction of the jury. That is not the rule where the note is accommodation paper. (*Smith v. Weston*, 159 N. Y. 194, 198 *et seq.*; *Vosburgh v. Diefendorf*, 119 id. 357, 364; *Citizens' Bank v. Rung Furniture Co.*, 76 App. Div. 471.)

It was for the plaintiff to establish the *bona fides* of the transaction.

It is claimed that the inter-relations of the stockholders at least permit the inference that the note was not accommodation paper. As noted above, the majority of the board of directors was composed of the same individuals in each corporation, and the major part of the stock of the two companies was owned by the same persons. So far as the evidence shows, however, there does not seem to have been any interconnection of business between the two companies indicating that each was liable for the obligations of the other. The defendant sold machinery to the knitting company which was paid for. That is the only transaction referred to. The companies must be treated as distinct entities whatever may be the composition of their stockholders or directorship, unless there is something to create the inference that they were in fact one body in dealing with the plaintiff, and there was no proof of any such relationship.

It is to be borne in mind that the defendant in this case is a manufacturing corporation. When an individual signs a note, either as maker or indorser, for the benefit of another, and allows it to be put in circulation, he is liable to a holder for value although such holder knew him to be an accommodation party. (Neg. Inst. Law, § 55, as *amd. supra*; *National Citizens' Bank v. Toplitz*, 81 App. Div. 593; *affd.*, 178 N. Y. 464.)

But a manufacturing corporation has no power to bind itself as an accommodation party. (*Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 23; *Bank of Genesee v. Patchin Bank*, 13 N. Y.

309; *National Park Bank v. German Am. M. W. & S. Co.*, 116 id. 281.)

So that the rule adverted to does not obtain in this case, and the plaintiff must show both that it was a holder for value, and also that it did not know the accommodation character of the defendant's signature.

The other question discussed in the brief of the appellant's counsel we do not deem it essential to refer to.

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred; WILLIAMS, J., in result only.

Judgment and order reversed and new trial granted, with costs to the appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY C. MARCH, Respondent, v. ANDREW J. BEAM and GEORGE O. FLYNN, Surviving Inspectors of Election of the Village of East Rochester, Appellants.

Fourth Department, January 30, 1907.

Elections — use of unofficial ballot unauthorized — mandamus to inspectors to reconvene and certify result.

The Election Law prohibits the use of unofficial ballots except as provided in sections 89 and 107.

When it appears that at a village election an official ballot conforming to the statute was printed and used, the inspectors of election are without authority to issue, poll or count unofficial ballots, and if they have done so, mandamus will issue to compel them to reconvene, return the unofficial ballots, correct the statement of the results of the canvass and make a proper certificate of the result.

The writ will issue even though the officials elected on the unofficial ballot have been declared elected and are holding office. While under the writ the court cannot oust *de facto* officers and induct others in their places, the writ lies for the purpose aforesaid, and the persons who then appear to have received the legal majority may assert their rights to office in a proper proceeding.

APPEAL by the defendants, Andrew J. Beam and another, from an order of the Supreme Court, made at the Monroe Special Term bearing date the 3d day of December, 1906, and entered in the

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office of the clerk of the county of Monroe, directing the issuance of a peremptory writ of mandamus.

Merton E. Lewis, for the appellants.

Harvey F. Remington, for the respondent.

Order affirmed, with ten dollars costs and disbursements, on opinion of SUTHERLAND, J., delivered at Special Term.

All concurred.

The following is the opinion delivered at Special Term :

SUTHERLAND, J. :

This is an application for a writ of mandamus to compel the inspectors of election and ballot clerk officiating at a village election, held in the village of East Rochester on the 13th day of November, 1906, to reconvene and return the unofficial ballots voted at such election, and to correct the statement of the result of the canvass of such election, and to make a proper certificate of the result thereof.

The first election in the village of East Rochester was held November 13, 1906. The village had recently become incorporated under the provisions of the general Village Law,* and the village clerk, on the thirty-first day of October, duly called and posted notices for such election to be held November thirteenth. November third a certificate of nomination was duly filed with the village clerk, signed by the requisite number of electors in said village, to entitle the ticket thus nominated to be printed upon an official ballot. The certificate of nomination named Henry C. March as a candidate for president; Charles S. King and Jones R. De Ritter as candidates for trustees; B. J. Fryatt for treasurer, and Lee Ransom for collector, and the ticket was designated "People's Ticket," and the emblem chosen was a house. No other certificate of nomination of any candidate was filed. The village clerk caused an official ballot to be printed with the necessary indorsement required by the statute,† and said official ballot contained the names of the nominees of the People's ticket in an appropriate column, and also a blank column, as required by statute,† in which the voters could write the names of other persons if they so desired.

* See Laws of 1897, chap. 414, as amd. — REP.

† See Election Law (Laws of 1896, chap. 909), § 81. — [REP.]

At the opening of the polls on the day of election unofficial ballots for a ticket, called the Citizens' ticket, headed by T. Joseph Mitchell as candidate for president, were handed to the inspectors of election by persons interested in securing the election of the so-called Citizens' ticket, and in spite of the protest of the watchers and supporters of the People's ticket the inspectors did hand to voters not only the official ballot, but the unofficial ballot aforesaid, and about 200 unofficial ballots were voted and received by the inspectors. At the close of the polls the inspectors were requested not to count the unofficial ballots, and a protest against said unofficial ballots was made upon the ground that they were void and were marked for identification; but the protests were ignored and the unofficial ballots were counted and the persons named therein declared elected, and a certificate of the result of the election was made and signed by the inspectors, in which the candidates upon the Citizens' ticket were credited with the full amount of votes received upon the unofficial ballot as well as votes which they received written in the blank column upon the official ballot. Had the unofficial ballots been thrown out, the People's ticket, headed by March, would have been elected. As it was, the Citizens' ticket was declared elected, and the men named therein took the oath of office and are now acting as village officers.

Under section 80 of the Election Law * it was the duty of the village clerk to provide official ballots for this election, which duty he performed, and section 106 of the Election Law provides as follows: "No ballot without the official indorsement shall be allowed to be deposited in the ballot box, except as provided by sections eighty-nine and one hundred and seven of the Election Law, and none but ballots provided in accordance with the provisions of the Election Law shall be counted." The exceptions referred to are where the official ballots are not delivered at the time required, or are lost, destroyed or stolen, or where the supply of official ballots is exhausted before the polls are closed. But in this case official ballots were provided, and there was an abundant supply.

Section 111 of the Election Law says: "Such inspectors shall,

* See Laws of 1896, chap. 909, § 80, as amd. by Laws of 1897, chap. 609; Id. § 86, as amd. by Laws of 1905, chap. 643.—[REP.]

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whenever unofficial ballots are voted, return all of such ballots in the package with the void and protested ballots." Instead of returning these unofficial ballots in a package with the original statement of the canvass, the inspectors in this instance put the unofficial ballots which they had counted in the ballot box with the official ballots which they had counted, sealed the box and turned it over to the custody of the village clerk.

In this proceeding the relator asks for an order directing the inspectors to reconvene and make a correct statement of the result of the canvass, rejecting the unofficial ballots as void and returning said unofficial ballots which had been voted in a package, as required by the statute, instead of leaving them in the ballot box; and I have no doubt of the power and duty of the court in this proceeding to grant the order asked for in this respect.

Ever since the agitation in this State for a reform of the ballot found response in the Saxton Law and in the later legislative enactments on the subject, the courts have recognized that the official ballot is the keystone of the new structure, and that the explicit prohibition upon the use of unofficial ballots, except in the instances allowed by the statute, must be enforced even if such enforcement in some cases results in the throwing out of the votes of honest citizens and the defeat of candidates favored by the majority, the greater interest of the people in the maintenance of the essential principles embodied in the reform measures being thus subserved. (*People ex rel. Nichols v. Board of Canvassers*, 129 N. Y. 395.)

It has been well said that in this proceeding the court cannot oust the *de facto* officers who are now serving, and induct the petitioner and his associates in their places. What the court can do in this proceeding, and is bound to do, is to see that the inspectors of election follow the law and make proper certification of the result. The persons who then appear to have received a majority of the legal votes can assert their rights to their respective offices, as they may be advised, in some other form of proceeding.

The application for a writ of mandamus is granted as to the inspectors, the form of the order to be settled on two days' notice, to take effect as of December 3, 1906, and the relator is allowed thirty dollars costs and disbursements.

RACHAEL ZUCKERMAN, as Administratrix, etc., of ABRAHAM ZUCKERMAN, Deceased, Respondent, v. NEW YORK CITY RAILWAY COMPANY, Appellant.

First Department, February 8, 1907.

Evidence — erroneous admission of prior statements to corroborate witness.

Although a witness on cross-examination has been asked if he did not make a certain oral statement concerning an accident, having denied that he did, it is error to permit him on redirect examination to testify as to what statement he did make; and where the witness was an important one in establishing the plaintiff's case, and the statement testified to was in corroboration of his direct testimony, the error is ground for a reversal.

APPEAL by the defendant, the New York City Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of April, 1906, upon the verdict of a jury for \$6,000, and also from an order entered in said clerk's office on the 24th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

Thomas J. O'Neill, for the respondent.

PER CURIAM:

In this action for damages resulting from the death of plaintiff's intestate, the principal question of fact was whether the deceased had come to his death by leaving the car while it was running at full speed, or whether he had been thrown to the ground by the negligent starting of the car while he was alighting. An important witness for the plaintiff was one Hetsch, who professed to have seen the accident. Upon cross-examination he was asked whether he had not made certain statements both at the coroner's inquest and to certain policemen. He denied that he had made the statements concerning which he was interrogated. Upon his redirect examination, under the objection and exception of the defendant, the witness was permitted to testify as to what he did say to the policeman some time

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after the accident happened. This was clearly error, for nothing is better settled than that the evidence of a witness upon the trial cannot be corroborated by proof of statements previously made by him. (*Dechert v. Municipal Electric Light Co.*, 39 App. Div. 490, 496.) The questions put to the witness on cross-examination did not open the door to the introduction of the objectionable evidence, for the witness denied having made the contradictory statements concerning which he was then asked. There was, therefore, no room for the application of the rule that a witness who has been required to give a part of a statement or conversation, may be permitted to give the whole thereof. (*Sexton v. Onward Construction Co.*, 93 App. Div. 144.) In view of the weight undoubtedly given by the jury to the testimony of this witness, and the general character of his evidence, we cannot say that his self-corroboration did not influence the verdict.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

Present — PATTERSON, P. J., McLAUGHLIN, HOUGHTON, SCOTT and LAMBERT, JJ.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

FABRIK SCHILLER'SCHER VERSCHLUESSE ACTIEN GESELLSCHAFT,
Appellant, v. DAVID A. NEASE, Respondent.

First Department, February 8, 1907.

Practice — security for costs by foreign plaintiff — granting security in discretion of court after service of answer.

A defendant waives his absolute right to require a non-resident plaintiff to give security for costs unless the motion therefor be made before answer. After the defendant has answered the granting of security for costs is in the discretion of the court, and the burden is on the defendant to excuse his failure to apply for security before answer.

Vague and general allegations of pressing and important business of defendant's attorney do not show an adequate excuse.

APPEAL by the plaintiff, Fabrik Schiller'scher Verschluesse Actien Gesellschaft, from an order of the Supreme Court, made at

the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of January 1907, denying the plaintiff's motion to vacate an order compelling the said plaintiff to give security for costs.

Woolsey A. Shepard, for the appellant.

Robert H. Strahan, for the respondent.

PER CURIAM:

The action was begun by the service of a complaint on August 30, 1906.

An answer was served on October 8, 1906. The complaint alleged that plaintiff was a foreign corporation, as indeed its name indicated. On December 22, 1906, the defendant obtained an *ex parte* order requiring the plaintiff to give security for costs and staying its proceedings until such security was given. It is settled by abundant authority in this department that a defendant waives his absolute right to require a non-resident plaintiff to give security for costs unless the order therefor is applied for before answer. Thereafter such an order becomes a matter of discretion, and will not, as a rule, be granted unless the defendant offers some reasonable excuse for not applying earlier for the order, or shows some reason other than the mere fact of non-residence why the order should be granted. In the present case nothing is shown to justify the exercise of the court's discretionary power in defendant's behalf.

The only excuse given for the delay in applying for the order is the very vague and general one of pressing and important business which crowded the matter out of the mind of the defendant's attorney. This is obviously insufficient.

The order denying plaintiff's motion to vacate the order requiring the plaintiff to give security for costs will be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

Present — PATTERSON, P. J., INGRAHAM, LAUGHLIN, CLARKE and SCOTT, JJ.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

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ISABEL A. HOLMES, Respondent, v. EGBERT B. SEAMAN, Appellant.
(Action No. 2.)

First Department, February 8, 1907.

Insurance — assignment by beneficiary of interest in gratuity fund, as collateral, contrary to provision therein — sustained as to moneys advanced to keep policy alive — second assignment without consideration — appeal — findings not incorporated in report.

The by-laws of the New York Produce Exchange prohibit the assignment or pledge of any interest in the gratuity fund of the exchange by a beneficiary except in so far as necessary to keep the interest of the member alive.

An assignment by such beneficiary made before the death of the insured as security for the repayment of loans made by the assignee to the insured during his lifetime is void.

The assignment is enforceable to the extent of moneys paid by the assignee to keep the policy alive.

Although such policy becomes assignable by the beneficiary after the death of the insured, yet, when without any new consideration, one who has advanced moneys to the insured during his lifetime and holds an assignment of the policy by the beneficiary procures a second assignment by representing to the beneficiary that it is made simply to confirm the prior assignment, and upon representations that he had a right to the assignment by reason of moneys advanced to the insured and concealing from the beneficiary his true reasons for the second assignment, the latter is void and ineffective to vest the assignee with a right to the proceeds of the policy except for sums advanced to keep it alive.

The fact that at the time of the second assignment the assignee agreed to allow the beneficiary to deduct from the proceeds of the policy sufficient money to bury the insured does not furnish a consideration for the assignment.

A proposed finding of fact, although marked by a referee, will not be considered on appeal if not incorporated in the report.

APPEAL by the defendant, Egbert B. Seaman, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 5th day of September, 1906, upon the report of a referee.

Albert Stickney, for the appellant.

George W. Weiffenbach, for the respondent.

INGRAHAM, J. :

Upon the former appeal from a judgment for the plaintiff in this action the judgment was reversed and a new trial ordered (184 N. Y. 486). The decision of the Court of Appeals determined the rights of the parties to this action under the first assignment made by the plaintiff and her mother, dated April 13, 1891. It was there held that the by-laws of the New York Produce Exchange "constitute a clear and unmistakable prohibition against the assignment or pledge by the beneficiaries of any interest in the gratuity fund of the New York Produce Exchange in payment or to secure the payment of a debt having no relation to such a fund and in nowise incurred for the purpose of keeping alive the interest of the beneficiaries in such fund. So far, therefore, as the first assignment assumed or purported to charge the interest of the plaintiff in the gratuity fund with any liability on account of the debt to the Oriental Bank of \$3,614.00 owing by Holmes to the Oriental Bank and paid by the defendant, together with the interest thereon, that assignment was ineffectual, and to that extent the referee was right in adjudging it to be void." It was further held, however, that the transfer of the interest of those executing the assignment by which they agreed that the trustees of the gratuity fund of the New York Produce Exchange should pay over to the defendant "such further sums of money as he, the said Egbert B. Seaman, shall or may pay to the said Produce Exchange or the trustees of the gratuity fund thereof, hereafter, for or on account of dues or assessments upon the said certificate, together with interest on each of such payments from the date thereof," was sufficient "to constitute a legal charge or lien upon the plaintiff's interest in the gratuity fund to the extent of the sum paid out by the defendant to the Produce Exchange upon the faith of the instrument and for the purpose of keeping the plaintiff's interest in that fund alive." In speaking of the second assignment or transfer made on April 5, 1901, the court said: "As we regard this first instrument as amply sufficient of itself to charge the plaintiff's interest in the gratuity fund with the sum thereafter paid out by the defendant to keep it alive, the circumstances under which the second assignment was obtained become wholly immaterial. Upon the evidence in the two cases the defendant was entitled to receive out of the plaintiff's interest in the gratuity fund the aggregate of all the amounts

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paid by him after the execution of the assignment on account of dues upon Holmes' certificate of membership and the assessments against Holmes on account of the gratuity fund with interest upon such payments from the dates at which they were made. He was not entitled to receive anything on account of the debt of Holmes paid to the Oriental Bank or interest thereon. The whole of the amount payable out of the gratuity fund on account of Holmes' membership was payable to the plaintiff less the sum heretofore mentioned as due to the defendant on account of the amounts paid by him to save the plaintiff's interest."

The effect of this decision is, that the sole interest of the defendant in the fund was the repayment to him of the amounts that he had paid subsequent to the execution of the first assignment to preserve to the beneficiaries the amount of the fund payable by the New York Produce Exchange upon the death of Holmes, a member of the exchange. While it may be conceded that after the death of her father the plaintiff, being entitled to the gratuity, would have the right to transfer that gratuity, as she would have the right to transfer any other chose in action, an instrument executed merely to carry out the former agreement, with no intention to make a new and independent assignment of the fund, and based upon a statement or representation by the person to whom the assignment was made that the assignment was to carry out the former instrument, conferred no new rights upon the assignee, and, without a new and independent consideration, would not affect the ownership of the fund. The situation as it existed when this second instrument was executed was that the defendant held an instrument executed by the plaintiff which assigned to him the plaintiff's right to the fund when it became payable to secure the repayment of the amount that he had paid to protect the fund.

The plaintiff's father died on March 31, 1901, leaving him surviving the plaintiff, his only child and next of kin, his wife having died before him. The referee found that on the evening of April 4, 1901, the day after the burial of the plaintiff's father, the defendant called upon her to obtain her signature to a paper which he said the Produce Exchange had requested him to get her to sign to confirm the former one, that of April 13, 1891, which paper then sought to be obtained was in terms an assignment to him of moneys due or

to grow due to her from the Produce Exchange by reason of her being the daughter of John A. Holmes, as might be sufficient to pay the defendant the sum of \$3,614 mentioned in the previous assignment of April 13, 1891, with interest from that date, and the further sum of \$2,014 for dues and assessments alleged to have been paid by the said defendant for said Holmes, with interest on each payment from the date when it was made; that the defendant said to the plaintiff in substance that the money was justly due to him and that he had a right to it, although he then knew that the assignment executed by the plaintiff and her mother was not effectual to enable him to collect the money due to her from the exchange or the gratuity fund; that the plaintiff wanted the defendant to allow her, out of the first moneys paid by the exchange on account of the gratuity fund, a sum sufficient to pay the expenses of her father's funeral and sickness, but this he was unwilling to do, fearful that it would come out of what he claimed to be due to him; that the plaintiff declined at that time to sign the paper which was left with her. The referee further found that the plaintiff was not indebted to the defendant in any sum whatsoever; that the defendant had no legal claim against her, but of these by-laws she was ignorant; that she believed that the defendant had a right to claim and take the money under the assignment of April 13, 1891, and that she could not withhold it from him; that the defendant knew that she so believed, and encouraged her in the belief; that he concealed from her his true reason for urging her to sign the new assignment, which was that he might obtain by it payment of his alleged loans to her father out of the gratuity belonging to her; that the plaintiff took the paper to a Mr. Weiffenbach, an attorney at law, who was a friend with whom she had long been acquainted, having been previously employed by him, and asked him to get the defendant to allow her, out of the money, a sum sufficient to pay the expenses of the funeral and doctor's bills; that the defendant consented to allow her \$500 for those purposes; that the proposed assignment was then changed by the insertion of a provision that, out of the first installment of the gratuity paid by the exchange, the plaintiff should receive the sum of \$500, and in that form it was signed by the plaintiff and delivered to the defendant on or about the day of its date; that on or about April 19, 1901, the plaintiff and the

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defendant met at the office of the Produce Exchange; that she received a check of the treasurer of the exchange for \$500; a second check for \$2,500 was drawn by the treasurer of the exchange to the order of Isabel A. Holmes and E. B. Seaman, assignee, which latter check was indorsed by the plaintiff and delivered to the defendant; that the representations and conduct of the defendant were calculated to and did mislead and deceive the plaintiff and induced her to execute the assignment aforesaid; that after the payment of the said \$3,000 there remained due to the plaintiff from the Produce Exchange, or the gratuity fund on account of said gratuity, the sum of about \$6,823.34; and this sum was paid into court by the Produce Exchange, and is in court subject to the final disposition of this action.

I think it clear that this second assignment was ineffectual to transfer to the defendant any right that the plaintiff had at the time it was executed to this gratuity fund which under the by-laws of the Produce Exchange was payable only to the widow or children of the deceased member, and which was not then chargeable with any indebtedness of the plaintiff's father to the defendant. The plaintiff had no intention to do any more than to carry into effect the former agreement executed by her and her mother, and which was valid to the extent of securing the defendant the repayment of such sums as he had paid subsequent to its execution to keep the membership of the plaintiff's father in the exchange alive, so that the fund would be preserved. There was no consideration for the assignment. The defendant paid to the plaintiff no money. He simply consented to allow her to receive a portion of the money which belonged to her and which was payable to her by the exchange. Legally, the defendant was entitled to be paid out of the fund the amount which he was paid subsequent to the execution of the first agreement, but whether he received that out of the first or second payment was entirely immaterial. He was sure of his money and sure of interest on it until it was paid, as the fund largely exceeded the amount to which he was legally entitled. His consent, therefore, that the plaintiff should be paid \$500 out of the first payment of \$3,000 that was made by the exchange was to allow her to receive what belonged to her and for which the defendant gave up no substantial right.

We think, therefore, that the defendant was entitled to receive the amount that he had paid after the execution of the first agreement, with interest to the date of the judgment. The referee finds in his report that "the indebtedness to said defendant for the amount paid by him for dues to the Exchange and assessments on account of the Gratuity Fund subsequent to April 13, 1891, with legal interest thereon, was the sum of \$2,544.99." He received from the treasurer of the exchange on or about April 19, 1901, the sum of \$2,500, which, upon this report, entitles him to a further payment of \$44.99 to be paid out of the balance of the gratuity fund which has been paid into court to await the determination of this action, and for that amount, with interest, to the date of payment, the referee awarded judgment to the defendant, the balance of the gratuity fund remaining after such payment to be paid to the plaintiff.

In separate findings of fact submitted by the defendant and which were marked as found by the referee there is the following: "After receiving the payment of \$2,500 from the trustees of the Gratuity Fund the amount remaining due and payable to the defendant on account of his advances, with interest to April 22, 1901, was \$5,848.81. This included a balance over and above said \$2,500 of \$273.54 for dues and assessments paid by the defendant after the execution of the first assignment." The defendant claims that in any event the judgment should be modified by awarding him this sum of \$273.54, instead of the sum of \$44.99 awarded by the judgment. These findings seem to be inconsistent. In a letter from the defendant to the plaintiff's attorney, dated January 8, 1902, there is inclosed a statement of the amounts actually paid by the defendant after the execution of the first agreement, from which it appears that the defendant actually paid \$2,044, and the interest on that to the date of the statement appears to be \$613.13. From these statements it would appear that there was due to the defendant in January, 1902, the sum of \$2,657.13. It also appeared that the defendant sold the membership seat in the exchange, for which he received \$120, and this amount should also be charged against the defendant. Therefore, the finding of the referee, that the amount due defendant at the time of the receipt of the \$2,500 was \$44.99 seems to be in excess of what the defendant was entitled to receive according to his own statement. The finding at the request of the defendant,

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therefore, that there was due the defendant on April 22, 1901, over and above the \$2,500 the sum of \$273.54 was not sustained by the evidence, and it should, therefore, be disregarded.

It may also be said that this tenth proposed finding of fact, although marked found by the referee, was not incorporated in his report and cannot, therefore, be regarded as a finding of fact which this court on appeal from the judgment can consider. (*Elterman v. Hyman*, 117 App Div. 519 decided herewith.)

It follows that the judgment appealed from should be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

PATRICK CONNOLLY, Appellant, v. HALL & GRANT CONSTRUCTION COMPANY, Respondent

First Department, February 8, 1907.

Master and servant — injury to workman by fall of temporary bridge — detail of work — negligence of fellow-servant.

In an action to recover for an injury caused by the collapse of a part of a temporary bridge or scaffold which was in use during the alteration of a building, it appeared that the superintendent had marked a place about midway between two of the upright supports at which the bridge was to be cut off. By direction of his foreman the plaintiff sawed across the bridge at the place indicated. As the last stretcher was severed the part of the bridge upon which the plaintiff was standing collapsed. Before the plaintiff had finished the cut a fellow-servant notified the superintendent that a support was needed under the part upon which the plaintiff was working. There was timber on hand which was suitable for such purpose.

Held, that the accident was caused by the defective method adopted in removing the bridge;

That the removal of such a structure was not a use thereof but a detail of the work in the performance of which the superintendent, foreman and workmen were fellow-servants, and for an accident resulting from the method employed the master was not liable;

That as no expert knowledge was involved and the superintendent and foreman were not shown to have had any knowledge of the conditions which the plaintiff did not possess, they were jointly negligent in failing to provide the proper supports.

McLAUGHLIN and HOUGHTON, JJ., dissented, with opinion.

APPEAL by the plaintiff, Patrick Connolly, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of March, 1906, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 19th day of March, 1906, denying the plaintiff's motion for a new trial made upon the minutes.

Moses Feltenstein, for the appellant

John Vernou Bouvier, Jr., for the respondent.

INGRAHAM, J. :

The defendant was the contractor for the alteration of a building on the corner of Beekman and Nassau streets; what was called a bridge had been constructed over Nassau street about ten feet above the surface of the street, which extended in front of this building to protect persons passing on the street during the progress of the alterations, and the bridge was also used for the purpose of holding materials used in the work; this bridge was constructed upon uprights upon the surface of the street. On the night of the 10th of December, 1901, a superintendent in charge of this work named Parish told the foreman of the gang of men of which plaintiff was a member to have a portion of this bridge cut down and marked out the portion to be taken away; and between seven and eight o'clock at night plaintiff was instructed by the foreman to saw this portion of the bridge off and was engaged in this work when he was injured. While he was thus engaged one of the employees called the attention of the foreman to the joint at the portion that was being sawed off and told him that a support was necessary. The man was told to get an upright and put it under the bridge. This he started to do. While this man under the direction of the foreman was getting the upright to support the bridge, but before it was put in place, the bridge fell and plaintiff was injured.

The foreman, Reynolds, was called as a witness for plaintiff and stated that on the night of the accident he was told by one of the workmen that there should be an upright under the place where the men were sawing; that he spoke to the superintendent about it

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but the superintendent said it was strong enough; that the superintendent gave to this foreman the order to cut the bridge down, marking off on top where to start the cutting.

Plaintiff testified that he was put to work sawing this bridge by Reynolds, the foreman, and Parish, the superintendent; that Parish came and marked where it was to be sawed; after that the plaintiff went to work and sawed along this line through the stretcher and then commenced sawing the beam, and finally reached the stretcher on the outside; while sawing through the outside stretcher the bridge fell. As a result of the accident the plaintiff's leg was crushed and subsequently amputated.

The superintendent, Parish, was called as a witness for the plaintiff and testified that he received orders from a Mr. Hall, who had charge of the work, to remove a portion of this bridge; that this bridge had been built about six months before the accident; that Reynolds, the foreman, told him that there ought to be another upright put under the end of the stretcher where they were sawing, and that he, Parish, told Reynolds to put an upright in; before it was put in, however, the bridge fell. The bridge appeared to be perfectly safe until the stringers were cut through. It was evident that the method adopted of doing the work of removal without supporting the structure caused the accident.

In removing a portion of a structure of this kind, it was the duty of the person in charge of the work to see that the remaining portion of the bridge was properly supported so that it would not fall when the supports were cut away. To give directions to cut through the supports or timbers so that the remaining portion would fall was negligent, and presented a question for the jury as to whether the person in charge of the work and directing its execution exercised reasonable care in doing the work. The only question presented is whether the defendant was liable for the method adopted of doing the work.

In *Vogel v. American Bridge Co.* (180 N. Y. 373) the defendant had contracted to erect an iron or steel frame on the roof of a factory building, and the plaintiff was one of the men engaged in this work. The foreman was a competent man, and had authority to manage the work. At the time of the accident the men were engaged in raising one of the trusses to an upright position; the

foreman directed them to use a certain rope which the men had rejected as not being strong enough; they thereupon used the rope which broke, the plaintiff being injured. It was held that the defendant was not liable on the ground that the foreman was a fellow-servant in relation to a detail of the work; that the servant in doing the work upon which the master employs him assumes as part of the ordinary risk attendant upon or implied from the nature of the work such as arises from the possible negligence of competent fellow-servants; that the foreman in directing the men to use a particular rope as being strong enough may have been negligent or may have committed an error of judgment, but that in neither case could the defendant be held responsible for his act. The rule is there summed up as follows: "The contract of the master does not extend further, in the direction of indemnifying his servant against injury from negligent acts, than that the negligence must be his own or such as is legally to be charged to him. If the master does or must employ some one to represent him in managing the performance of the work and he neglects no precaution in the selection of a competent foreman and in making all reasonable provision for a safe and proper execution of the work he has discharged his duty. As to the details in the execution of the work the foreman and workmen are fellow-servants." Although there was a strong dissent the rule stated in the dissenting opinion would seem to sustain this judgment, as it was there said: "When the master furnishes sufficient appliances and an unsuitable one is used owing solely to the act of a mere foreman or other employee, then such selection is a detail of the work for which the master is not responsible. But when the use of the improper appliance is due to the refusal of the master or of his *alter ego* to allow the workman to take a proper appliance, though he may have such appliances on hand, the situation is exactly the same as if he had failed altogether to furnish proper appliances."

In *O'Brien v. Buffalo Furnace Co.* (183 N. Y. 317) the accident was caused by the premature explosion of some dynamite which was being used in removing some slag which had accumulated at the base of a blast furnace. The explosion of this slag had been intrusted to one Minor. Encased in the slag was a coil of iron pipe, and Minor proceeded to fill this pipe with dynamite, plaintiff's inter-

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tate assisting Minor by cutting up a stick of dynamite and dropping the pieces into the pipe. While the deceased was doing this work Minor used a steel rod six feet long to push down the pieces that clogged the pipe, and while this work was being done the dynamite exploded. The evidence tended to show that the use of a metal rod was improper, and that a wooden one should have been used. The court said that "from the foregoing facts no inference of liability on the part of the master could be drawn, and if they were the only facts, the judgment below would have to be affirmed. While it is the duty of the master to warn the servant of any latent or extraneous danger in the prosecution of the work, and to give him proper instructions, if instructions are necessary, to guard against such dangers, this rule does not apply to an obvious risk of the work. * * * The statements of the foreman and the superintendent that there was no danger seem no more than declarations of opinion on their part which the deceased might accept or reject as he deemed wise. Nor do we see that any instructions to him would have added to his security or prevented the accident. The explosion was caused by the negligence of Minor in using a rod of steel instead of one of wood. This was the negligence of a fellow-servant in the performance of a detail of the work."

In the case of *Pluckham v. American Bridge Co.* (104 App. Div. 404; *affd.* without opinion, 186 N. Y. 561) a recovery was sustained upon the ground that a machine that was used, which included a rope to secure the beams which were being moved in place, was insufficient for the work that it was required to do, and that in furnishing this insufficient appliance the master was liable. There was evidence to show that the rope that was used was known to be unsafe, and that one of the workmen was sent to get another rope that was more suitable, and the workman returned and stated that there was no other rope available. This court there said: "The evidence in this regard was clearly sufficient to have authorized the jury to find that at the time when the rope in question was used there was no other rope upon the premises which could have been obtained by the workmen to supply the place of the one that was used. * * * The obligation resting upon the master was to exercise reasonable care in furnishing safe and suitable appliances. The jury would have been authorized to find that the defendant failed in this

regard in not supplying a sufficient quantity of rope safe and suitable to be used for the purposes required." That, assuming that the foreman was a fellow-laborer, for whose negligence the defendant would not be liable, it was held that his negligence was only a cause contributing to the accident, and that it became united with the negligence of the defendant in failing to furnish a suitable appliance. *Vogel v. American Bridge Co.* (*supra*) was then discussed, and the distinction between the case then under consideration and the *Vogel* case was stated to be that in the latter case the master had furnished suitable appliances in every respect which might have been used in place of the defective rope that caused the injury, and that the master having discharged this obligation, the foreman did not stand in the relation to the employee of an *alter ego* of the master; that in the case then before the court that question was not of consequence, for the evidence tended to establish that the master failed in his obligation to furnish a safe and suitable appliance, and the case was, therefore, clearly distinguishable from the *Vogel* case, and that distinction required that the case should be submitted to the jury. The *Pluckham* case, therefore, having been decided in this court as distinguished from the *Vogel* case, in the particulars there stated the affirmance by the Court of Appeals cannot be construed as overruling the *Vogel* case, and, therefore, the principle there established is still, as I understand it, the law of this State.

The superintendent of this work, Parish, received his orders from the general manager of the defendant, who was undoubtedly the *alter ego* of the defendant, to remove a portion of this structure. The details of that work were left to the superintendent who proceeded to carry out his orders as he understood them. There is no claim but that there was plenty of materials furnished by the master to properly support the structure while part of it was being taken down. The superintendent, Parish, the plaintiff's foreman, the plaintiff and another workman were engaged in carrying out the directions of the defendant. There was here no scaffold supplied by the master to do the work, but the structure that had been used for that purpose was being removed. The necessary result of removing such a structure is that part of it would come down as that was the object of the work that was being done. The acci-

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dent resulted from the defective method adopted in removing the structure. There is nothing to show that the superintendent or the foreman had any other knowledge of the conditions that existed than had the plaintiff, and it would seem that it was as much the duty of the plaintiff to protect the end of this structure which would be left unsupported when the supports were sawed through as it was the superintendent's or foreman's duty. They were all engaged in removing this structure, and it could hardly be said that it was a matter of expert knowledge, because another workman employed in the same grade as the plaintiff saw that the structure was likely to fall when sawed through, and upon the attention of the superintendent being called to that fact this man was directed to properly support the structure, and while engaged in getting such supports the structure fell. The only fault under those circumstances would seem to be the failure of warning the plaintiff from continuing his work until the support was furnished, but it does not appear that either the foreman's or the superintendent's attention was called to the fact that the work was so nearly completed that there was not time to put in the necessary support before the support was cut through.

It was not, therefore, the use of this structure as a platform or structure that caused it to fall and injure the plaintiff, but the plaintiff was injured while removing the structure and carrying out the orders of defendant, because it was not properly supported while being so removed. The conclusion seems to be that this was a detail of the work, in doing which the plaintiff, superintendent and foreman were fellow-servants, and the neglect to properly support the structure while a portion of it was being removed was negligence in which all three joined as fellow-servants and for which, therefore, the defendant is not liable.

It follows that the complaint was properly dismissed and the judgment must be affirmed, with costs.

PATTERSON, P. J., and LAMBERT, J., concurred; McLAUGHLIN and HOUGHTON, JJ., dissented.

McLAUGHLIN, J. (dissenting):

The defendant was obligated to furnish the plaintiff with a reasonably safe place in which to do his work and it could not exempt

itself from liability for a failure in that respect by delegating that duty to another. (*Benzing v. Steinway & Sons*, 101 N. Y. 547; *Probst v. Delamater*, 100 id. 266; *Pantsar v. Tilly Foster Iron Mining Co.*, 99 id. 368.) The place here furnished was the bridge. The defendant knew how it was constructed and the weight it would sustain, of which the plaintiff was ignorant. It, therefore, knew, or in law was bound to know, that as soon as the plaintiff had performed the work assigned to him, viz., sawed off one of the supports, the bridge would collapse unless otherwise supported. It is of no importance whether the superintendent, Parish, or the foreman, Reynolds, directed the plaintiff where to saw off the timber, because whoever gave the order was the *alter ego* of the defendant.

The fact that the bridge was being taken down does not qualify or change this rule, because the plaintiff was just as much entitled to a reasonably safe place to work in taking down the bridge as he would have been if the bridge were being constructed. The rule which exempts a master, under such circumstances, presupposes in each instance that he has performed the obligation which the law imposes upon him and the injury occurs solely through the negligence of a coemployee. (*Stringham v. Stewart*, 100 N. Y. 516; *Pluckham v. American Bridge Co.*, 104 App. Div. 404; S. C. *affd.*, 186 N. Y. 561.)

The fact that there was sufficient material at hand to render the bridge secure, had the same been used, does not relieve the defendant from liability, because it was its duty, having directed the plaintiff to do certain work which rendered the bridge insecure, to see that such materials were used and the bridge made and kept reasonably safe while workmen were upon it. The plaintiff assumed the risk incident to the nature of his employment, but not the added risk resulting from the defendant's neglect, which was its failure to strengthen the bridge as the plaintiff's work weakened it. Whether the defendant performed its duty in this respect was, under the facts presented, a question for the jury.

For these reasons I am unable to concur in the opinion of Mr. Justice INGRAHAM and vote to reverse the judgment and order a new trial.

HOUGHTON, J., concurred.

Judgment affirmed, with costs. Order filed.

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CHARLES H. MILLER and WILBUR LARREMORE, as Trustees of JAMES E. MILLER and EMMA Z. SMEDLEY, under the Last Will and Testament of JANE M. MILLER, Deceased, Respondents, v. FANNY HARRIS and GEORGE W. LEWIS, Appellants.

First Department, February 8, 1907.

Mortgage—action by mortgagee for fire insurance moneys had and received by mortgagor under contract to rebuild—liability of cotenant not joining in mortgage—evidence—judgment in foreclosure to show deficiency—declarations against interest of joint mortgagors.

A complaint which alleges in substance that the plaintiffs, as mortgagees, and entitled to be paid the proceeds of fire insurance on the premises, consented to the payment of a loss to the mortgagors upon their promise to use the sum in erecting a new building upon the premises equal in value to that destroyed, and the failure of the mortgagors to fulfill that promise, states a cause of action for money had and received. The failure of the mortgagors to fulfill the promise imposes upon them an obligation to repay the insurance money received by them to the mortgagees and on failure to do so they hold the same as money had and received.

When, however, it appears that an owner of an undivided interest in the property did not join in the mortgage and was not liable for the amount secured to be paid and had no knowledge of the mortgage or even of her interest in the property, a judgment against her for money had and received is not warranted upon mere proof that she signed the proof of loss and indorsed the check of the insurance company, which were presented to her for signature by the other mortgagors, and when there was no promise to erect a building made by her or on her behalf.

In such action for money had and received the record of the judgment and sale on foreclosure is properly admitted in evidence to show that the amount due on the mortgage had not been paid, this being a prerequisite to an action for money had and received.

The declarations of the mortgagors who acted together in obtaining the insurance money is admissible against them but not against the other owner of the property.

APPEAL by the defendants, Fanny Harris and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 23d day of April, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of May, 1906,

denying the defendants' separate motions for a new trial made upon the minutes.

Ezekiel Fixman, for the appellants.

Otto C. Wierum, Jr., for the respondents.

INGRAHAM, J. :

The plaintiffs, as trustees, held a mortgage dated May 23, 1898, upon certain real property owned by the defendants and one Nathan Lewis, since deceased, as tenants in common. The buildings on the mortgaged premises were insured, loss, if any, payable to the plaintiffs as mortgagees. The property was conveyed to the defendants and Nathan Lewis on the 24th day of February, 1899, subject to the mortgage. On the 9th day of May, 1899, the building upon the property was destroyed by fire, and the amount payable under the policies of insurance was adjusted at \$2,750. The complaint alleges that this sum of money was paid by the insurance companies "to and received by the defendants and said Nathan Lewis, as tenants in common of said property, to the use of the plaintiffs, who consented to such payment being so made to said parties upon the express promise made to them by the said Nathan Lewis and the defendants that the said moneys would be used in the erection of like buildings upon said premises of a value equal to the value of those destroyed;" that neither the defendants nor the said Lewis did rebuild any building upon the premises in place of those destroyed; that subsequently the plaintiffs foreclosed the mortgage upon the property; that the property was sold, and there resulted a deficiency of \$4,991.75. The answers put at issue these allegations of the complaint. At the end of the trial counsel for the defendants moved to dismiss the complaint upon the ground that the plaintiffs had failed to prove any cause of action against the defendants, and, further, upon the ground that they had failed to prove that the sum of \$2,750, or any sum, was paid to or received by the defendant Fanny Harris for the use of the plaintiffs, or for the use of any other person, or that she made any promise in relation to rebuilding the house upon the premises, or that she authorized any person to make any contract on her behalf in relation to rebuilding the premises, and upon other grounds. This

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motion was denied, and the defendants excepted. The court then left the case to the jury with instructions that it would be the duty of the jury to determine whether or not by the consent of the plaintiffs this fund went into the hands of Nathan Lewis alone, as claimed by the defendants, or whether they all, either actually or constructively, received the same. The court then stated that the evidence of the promise was certain conversations had with Nathan Lewis, a brother of the defendants, who was also a part owner of the property, at which conversations, or a part of them, the defendant George W. Lewis was present; that the defendant Harris was sought to be charged as having authorized Nathan Lewis to act for her, so that he was her agent, authorized to make the promise relied upon; and left it to the jury to say whether or not Nathan Lewis was the agent of the defendant Harris. At the close of this charge counsel for the defendants said that he was perfectly satisfied with the charge, and the jury subsequently found a verdict for the plaintiffs for the amount claimed, with interest.

I think the allegations of the complaint are sufficient to sustain a cause of action for money had and received. By the policies of insurance the plaintiffs were entitled to receive the amount due from the insurance companies on account of their mortgage. It appeared that checks were drawn by the insurance companies payable to Nathan Lewis and the defendants and to the plaintiffs as trustees. Thus, to secure the payment of these checks, it was necessary that they should be indorsed by Nathan Lewis and the defendants, and also by the plaintiffs as trustees. These checks were received by Nathan Lewis or the defendant George Lewis, and were presented indorsed by defendants and Nathan Lewis to the attorneys for the plaintiffs who had charge of the matter with a request that the plaintiffs indorse the check and sign the receipt for the money from the insurance company; that the attorney with whom the conversation was had refused to indorse the checks, saying that the trustees expected to get the money from the insurance company and expected to rebuild the buildings upon the mortgaged premises; that the defendant George Lewis said that Mr. Spencer, one of the attorneys for the plaintiffs, had agreed that "We" (evidently referring to Nathan Lewis and himself) had agreed with Mr. Spencer that they were to get the money and to put it into new

buildings to be erected upon the premises ; that they were to put a great deal more money into the building than was to be received upon the insurance policies, and that Mr. Spencer had agreed to allow them to take the money for that purpose. The matter was then referred to Mr. Spencer. Mr. Spencer testified that he had a number of conversations with Nathan Lewis in relation to the payment of this money by the insurance companies ; that Nathan Lewis and the defendant George Lewis had stated to him that they proposed to rebuild the house which had been upon the property and to use the insurance money and to add to it a considerable sum of money ; and they asked Mr. Spencer whether the trustees would be willing to allow him to use the insurance money for that purpose. No agreement was made at that time ; that subsequently Nathan Lewis had another interview with Mr. Spencer who said that the trustees would allow him to use the insurance money for the purpose of erecting a new building upon the premises. This was before the receipt of the checks from the insurance companies. He further testified that there was a subsequent conversation, when the checks from the insurance companies were presented for indorsement, at which the defendant George Lewis was present, and that the said checks were then indorsed by the attorneys for the plaintiffs. The defendant Harris was called as a witness by the plaintiffs and testified that Nathan Lewis and the defendant George W. Lewis were her brothers ; that she had no recollection of signing at any time any papers in relation to this property, and never knew that she was a part owner of it ; that her brother Nathan Lewis died in the year 1901 ; that she never heard about there being a fire ; that she did not know her brother had an interest in the property, or that she had an interest in it ; that she trusted her brother and left the matter entirely in his hands ; that the two checks for the payment of this insurance policy were indorsed by her in blank ; that she never knew that this property was mortgaged for \$6,000 ; that at the time she signed the papers her brother Nathan Lewis said, "Fanny, I had a fire up there, and I would like you to sign this paper ;" that she did not read the paper, as she trusted her brother. These papers were the proof of loss and, apparently, the checks were for the payment of the loss.

I think there was evidence to sustain this judgment against the

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defendant George W. Lewis. He had to do with the collection of the amount of loss of the insurance companies, took these checks to the attorney for the plaintiffs, and stated that he and his brother were to have that money to erect new buildings upon the premises, and was present at the time that the final agreement was made between his brother Nathan Lewis and the plaintiffs' attorneys. The money was thus paid to Nathan Lewis and the defendant George Lewis upon the promise that the amount of the insurance money would be invested in new buildings upon the premises which would enhance the value of the property covered by the mortgage, and for that purpose, and that purpose only, the attorneys for plaintiffs consented to the payment to Nathan Lewis. The failure of Nathan Lewis and George W. Lewis to carry out their promise imposed an implied obligation upon them to at least repay the money that they had in their hands which was to be used in the erection of a building upon the premises which would increase the plaintiffs' security. This money, under the policies of insurance, was payable to the plaintiffs. It was their money, placed by them in the hands of Nathan and George Lewis upon a promise that it would be invested in a building upon the premises. The failure of Nathan and George Lewis to keep that promise left them with so much money belonging to the plaintiffs in their hands which the plaintiffs were entitled to recover as money had and received. The case as to the defendant Harris, however, is quite different. She had no interview with the plaintiffs or their attorneys, made no promise to them and received none of the money. She testified that she knew nothing about the transaction, except that she was requested by her brothers to sign some papers, which she did; but the signing of these papers was only the preliminary step necessary to place the money representing the value of the buildings destroyed by fire in the hands of the plaintiffs. It was after she had signed these papers and indorsed the checks that they were presented to the plaintiffs' attorneys for their signature and indorsed by them upon the agreement specified. There was no promise made on behalf of the defendant Harris, or no money received by her, unless Nathan Lewis was her agent to receive the money and was authorized by her to make a promise in relation to it. It is true that it appears that she was the owner of an undivided interest in the

property, but she had never signed the bond and mortgage, and was not liable for the amount secured to be paid. Her evidence, which is the only evidence in relation to her connection with the transaction, was that she did not know that she had an interest in the property and had nothing to do with the transaction; and while she says she trusted her brother and left everything to him, in the absence of evidence to show that she had anything to do with the property or the insurance money, or its receipt, or the agreement under which it was received, she was not liable for the money that was received and used by Nathan Lewis without her knowledge or consent.

The appellants raise several questions relating to the rulings on evidence, but we think no error was committed. The evidence of the sale under the judgment of foreclosure, while possibly not necessarily a part of the plaintiffs' cause of action, was competent to show that the amount due on the mortgage had not been paid, for if the plaintiffs had realized the amount of their mortgage by a sale of the property, they could not maintain this action for money had and received. While the evidence of declarations of Nathan or George Lewis was not competent as against the defendant Harris, the declarations of Nathan Lewis were competent as against George Lewis, as the evidence is sufficient to show that they were acting together in obtaining this insurance. The other objections to testimony do not require discussion.

I think, therefore, that the complaint should have been dismissed as against the defendant Harris, and that as to her the judgment should be reversed and a new trial ordered, with costs to the said appellant to abide the event, and that the judgment as to the defendant George W. Lewis should be affirmed, with costs.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

As to defendant Harris, judgment and order reversed and new trial ordered, costs to appellant to abide event; as to defendant Lewis, judgment and order affirmed, with costs. Order filed.

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ANNA SEITZ, Appellant, v. MAGDALENA MESSERSCHMITT and Others,
Defendants.

MAGDALENA MESSERSCHMITT, Purchaser, Respondent.

First Department, February 8, 1907.

Real property — escheat — when title of State not divested by foreclosure.

When a mortgagor dies without heirs capable of inheriting, the lands escheat to the State which takes title subject to the mortgage. But as a sovereign State cannot be sued without its consent, the courts obtain no jurisdiction in an action of foreclosure as against the State, even though the Attorney-General be made a party defendant.

Under such circumstances the title of the State is not divested by the sale on foreclosure, and, if the Statute of Limitations has not run against the State, the purchaser's title is not marketable.

LAUGHLIN, J., dissented, with opinion.

APPEAL by the plaintiff, Anna Seitz, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of September, 1906, granting a motion made by Magdalena Messerschmitt to be relieved from her purchase made at a sale pursuant to an interlocutory judgment in partition, upon the ground that the title to the premises in question is unmarketable.

George Q. Collins, for the appellant and for infant defendants.

Joseph T. Weed, for the respondent.

INGRAHAM, J. :

The questions presented on this appeal are stated in the opinion of Mr. Justice LAUGHLIN. There is one ground upon which I do not agree with him.

The conveyance of the referee on the sale under the judgment in the foreclosure action is the foundation of the title; in that action no defendant, as representing the heirs at law of the mortgagor, was made a party, it being alleged that the mortgagor died owning the equity of redemption in the property without heirs at law, which it may be assumed meant without heirs at law capable of

inheriting real property in this State. The title is sought to be sustained upon that theory. If, however, the owner of the equity of redemption died without heirs at law capable of inheriting the title to his real property, it escheated to the State, who, therefore, became the owner of the property in question subject to the mortgage?

I agree with Mr. Justice LAUGHLIN that the facts would justify a finding that the mortgagor and owner of the equity of redemption died without heirs at law capable of inheriting, and that, therefore, at his death the title to the property vested by escheat in the State. The question, then, is whether the title of the State was affected by the sale under the judgment of foreclosure. The People of the State were not a party to the foreclosure action, and it always has been a settled rule of law that a sovereign State could not be sued in its own courts without its consent. This question is discussed by Mr. Justice MITCHELL in *Kiersted v. People* (1 Abb. Pr. 385), and the rule, as I understand it, is there stated. He quotes from BRONSON, J., in *Delafield v. State of Illinois* (2 Hill, 159), that "where a State is made defendant the State courts cannot exercise jurisdiction." It seems to me clear that if the courts of the State could acquire no jurisdiction as against the State to affect its title to real property, making the Attorney-General of the State a party defendant in actions affecting real property, could give the court no jurisdiction to sell the property of the State under a judgment in that action. Upon the assumption that the property escheated to the State, the State became the owner of the equity of redemption, and to sustain the title offered to the purchaser we must hold that the deed by the referee under the judgment of foreclosure conveyed the equity of redemption which had become vested in the State. If the court had no jurisdiction over the State, in whom the title to the property had vested, it certainly could not sell the interest of the State in the property under a judgment in an action to which the State was not a party (2 R. S. 192, § 158; 3 R. S. [5th ed.] 273, § 88 [158]; 3 R. S. [6th ed.] 199, § 102 [158]; revised in Code Civ. Proc. § 1632); and as the Statute of Limitations has not run against the State, I do not see how we can say that the interest of the State has been divested by the sale under this judgment.

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The cases in which courts of equity have allowed a State or the Attorney-General of a State to be made a party defendant have been cases in which there had been a lien upon real or personal property, which apparently was owned by the State and the Attorney-General was made a party, not for the purpose of affecting the rights of the State, but to notify him of the existence of the controversy, so as to give him an opportunity to appear and protect the interests of the State if he so desired. But in no case that I can find has it ever been held that where real property had vested in a State, making either the State or the Attorney-General a party to an action affecting such real property without legislative sanction, could divest the State of the property that had vested in it. While the Attorney-General was the legal officer of the State, he had no power to divest the State of real property, that power resting solely with the Legislature. Making him a party did not bind him to interpose on behalf of the State, and upon principle I cannot see how it can be said that making him a party to the action and his appearance in the action could vest the court with jurisdiction to sell the property of the State so as to divest it of title.

I do not think we can declare in this action, to which the State is not a party, that the title of the State to this property has been divested by the sale under the foreclosure suit, and, therefore, I think the title is not marketable.

The order should, therefore, be affirmed, with ten dollars costs and disbursements.

CLARKE and SCOTT, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

The premises in question are known as Nos. 657 and 659 East One Hundred and Fifty-first street, borough of The Bronx, city of New York, and consist of a parcel fifty feet in width by one hundred and fourteen feet in depth, on the northerly side of the street, commencing twenty feet easterly from Melrose avenue. In 1860 the easterly twenty-five feet were owned in fee simple absolute by William Bower, who on the twenty-first day of March, that year, duly mortgaged the same, his wife joining in the mortgage. The mortgage by mesne assignments came to one Herbert J. McDonald, who in the month of November, 1871, brought an action in the

Supreme Court, Westchester county, to foreclose the same. The mortgagor had died in the meantime, but his widow, who had joined in the mortgage, was living. She was made a party defendant, and both *summons* and *complaint* were personally served upon her, but she defaulted in appearing. The only other defendant was "Marshall B. Champlain, Attorney-General of the State of New York, in behalf of the people of the State of New York." It was alleged in the complaint that the mortgagor had died "leaving his widow and no heirs at law or next of kin, and by reason whereof Marshall B. Champlain as Attorney-General of the State of New York, in behalf of the people of said State of New York, have or claim to have some interest in or lien upon the said mortgaged premises." Champlain as a party defendant, by the description contained in the title, served the usual notice of appearance, which he subscribed "M. B. Champlain, Attorney-General for the people of the State of New York," and therein waived notice of all proceedings, except notice of application for surplus moneys. Upon proof of service upon the defendant Bower, and this notice of appearance, the usual steps and proceedings in a foreclosure action were taken and had, and judgment of foreclosure was entered, under which the property was sold by the sheriff to the defendant Bower, the widow of the mortgagor, and a conveyance thereof executed to her by him on the 14th day of February, 1872. The premises were struck off to her on her bid, which just equaled the amount of the indebtedness and the costs and expenses of the action, and, as there was no surplus, no surplus money proceedings were had. By mesne conveyances from the purchaser at foreclosure sale, the property became vested in one Joseph Messerschmitt in or prior to 1880. It does not expressly appear whether or not the purchaser at the foreclosure went into possession at once. The plaintiff is the daughter of said Messerschmitt by his first wife, and the defendant, the purchaser here, is his second wife. They derived the title which it was sought to partition in this action, and which has been sold, through him. It is evident that this was a friendly application to determine the marketability of the title, because the widow, who is the purchaser, as well as plaintiff, her stepdaughter, presents an affidavit showing her knowledge concerning the possession and title of her husband. It appears by their affidavits that Messerschmitt was in possession

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as early as 1880; that the premises were then inclosed by a substantial inclosure, and about five years thereafter he built two apartment houses thereon, which covered the entire frontage, and that that part of the premises not covered by the buildings remained inclosed by a substantial inclosure until after his death in 1894, or during a period of about twenty-five years; that during this entire period no claim adverse or hostile to the ownership or title of said Messerschmitt was made by any person or persons to their knowledge, and that they never learned from him that such claim was ever made.

The defects in the title claimed by the purchaser were that the equity of redemption which was in the heirs of the mortgagor, or the people of the State was not foreclosed, owing to the failure of the plaintiff to make unknown heirs of the mortgagor (Code Proc. § 135, as amd. by Laws of 1860, chap. 459, § 4) or the people of the State parties defendant. The purchaser in claiming that the heirs of the mortgagor should have been made parties defendant, relies upon the rule that it is presumed that no man dies without heirs. (22 Am. & Eng. Ency. of Law [2d ed.], 1291, and cases cited; *Ettenheimer v. Heffernan*, 66 Barb. 374; *Bradley v. Dwight*, 62 How. Pr. 300; *Pitkin v. New York & New England R. R. Co.*, 64 Conn. 482; *Harvey v. Thornton*, 14 Ill. 217; *Lawson* Presump. Ev. [2d ed.] 249; *Bell v. Hall*, 76 Ala. 546; *John, Admr., v. Hunt*, 1 Blackf. [Ind.] 324.) The appellant, however, contends that such presumption is overcome by the allegations of the complaint in the foreclosure action, which were not controverted, and, therefore, stands as if determined by the court upon the trial of an issue. If it had been alleged that he left only one heir who was made a defendant and defaulted, surely it would not be necessary to prove the allegations by calling witnesses, and the burden would be on the purchaser of showing other heirs. It would seem, unless it is impossible that a person could die without heirs at law, capable of inheriting his realty, that this allegation of the fact would be controlling, at least in the absence of some evidence of the existence of heirs. It is manifest that there may have been blood relations and yet not heirs at law capable of inheriting the land. The allegations of the complaint should be construed as meaning that he left no heir capable of inheriting for that is the sense in which the term is used in the

complaint and it is strictly its legal meaning. (*Tillman v. Davis*, 95 N. Y. 17.) In 1871 alien heirs were incapable of inheriting real property in this State. (*Luhrs v. Eimer*, 80 N. Y. 171, 178.) Moreover, the presumption that no one dies without leaving heirs capable of inheriting his real property cannot be conclusive, for he may, and that the State shall then take by escheat the Constitution expressly contemplated. (Const. [1846] Art. 1, § 11.) It is evident that there is no hard and fast rule on the point, and that it is possible that one may die without heirs capable of inheriting, and that circumstantial evidence, or great lapse of time, may be sufficient to overcome the presumption that he did not. In the second edition of the American and English Encyclopædia of Law (Vol. 22, p. 1291) the law on this subject is stated as follows: "Owing to the recognized fact that comparatively few persons die without heirs, either near or remote, it is presumed that decedents leave heirs. But the non-existence of heirs within a particular degree may be established by circumstantial evidence, and after a great lapse of time and the non-appearance of heirs, their non-existence may be presumed." In *Harvey v. Thornton* (*supra*), which was a foreclosure action in which the decree was taken by default, the mortgagor's administrator was made a party defendant, but his heirs were not joined in any form, and there was no allegation that there were not heirs. The court held that there was a presumption that heirs existed capable of inheriting, but the court said: "It may perhaps be, if the bill had contained an allegation that the mortgagor died without heirs, that the decree might be sustained. But in the absence of such an averment, it is clearly the duty of this court to intend that there are persons in existence who inherited the equity of redemption." In *Moran v. Conoma* (59 N. Y. Super. Ct. 101; *affd.*, 128 N. Y. 591) objection was made to a title by the purchaser on foreclosure, upon the ground that proof should have been offered as to persons described in the summons as unknown, absentees and heirs at law of the mortgagor, to show who such unknown persons and absentees were, or to show that the mortgagor did in fact die without heirs. It appeared that he left the city of New York shortly after giving the mortgage and had not been heard from for upwards of thirty-five years. It was held that the objection, was not sufficient to

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release the purchaser, the court following *Wheeler v. Scully* (50 N. Y. 667), where the mortgagor, after executing the mortgage in 1853, left home and had not been heard from at the time of the foreclosure. He was served by publication and his unknown heirs were made parties defendant. The objection raised to the title was that it was to be presumed that the mortgagor was dead and he left heirs at law who might be infants, who would not be barred by the judgment. It was held that even if the service would not have been good against infants, if the mortgagor had died leaving infant heirs, yet the burden of showing infancy rested upon the purchaser.

In *Bradley v. Dwight* (*supra*) which was an action to redeem, the plaintiff claimed through the People by release from the Legislature of their title by escheat. The defendant claimed title under foreclosure wherein it was alleged that the owner of the equity of redemption died seized of the premises, intestate, unmarried and without issue, leaving him surviving a father, an alien who also died without issue. The People of the State were not made a party defendant, either directly or indirectly. The defendant and his grantees had been in possession under the deed in foreclosure. A demurrer to the complaint was sustained upon the ground that it did not affirmatively appear that the owner died without heirs having legal capacity to take as he might have had brothers or sisters. But inasmuch as there was no allegation in the complaint in foreclosure in that case that the owner of the equity of redemption died *without heirs*, it is not an authority on the point now under consideration.

It appears to me that there is no defect in this title disclosed on the face of the record and that it is incumbent on the purchaser to show that there were heirs. (See *Greenblatt v. Hermann*, 144 N. Y. 13; *Wheeler v. Scully*, 50 id. 667; *Moran v. Conoma*, 59 N. Y. Super. Ct. 101; *affd.*, 128 N. Y. 591; *Hagan v. Drucker*, 90 App. Div. 28; *Lenahan v. College of St. Francis Xavier*, 51 id. 535; *Goodwin v. Crooks*, 33 Misc. Rep. 39; *affd.*, 58 App. Div. 464; *Matter of Sullivan*, 51 Hun, 378; *Barson v. Mulligan*, 66 App. Div. 493.) The judgment in partition under which the premises have been sold establishes presumptively that the title offered for sale is in the parties to the action of which

the purchaser is one. (*Goodwin v. Crooks, supra.*) In view of the fact that the widow of the mortgagor was made a party defendant, and the complaint containing the allegation that her husband died without heirs was served upon her, it is reasonable to infer that the allegation in the complaint was in accordance with the facts, especially as it was assumed that title has escheated to the State and the Attorney-General was made a party. In those circumstances there was no likelihood of collusion.

Moreover, I am of opinion that, upon this branch of the case, the title is good by lapse of time. It is to be borne in mind that the only right in the mortgagor or in his heirs, if he left any, was a right of redemption after the mortgagee or those who became subrogated to his rights under the mortgage by the judgment in foreclosure came into possession of the premises. (*Lunny v. McClellan*, 116 App. Div. 473.) The Statute of Limitations against such an action is ten years after possession is taken by the mortgagee or his successor in interest. (*Hubbell v. Sibley*, 50 N. Y. 468.) It is likely that the purchaser went into possession immediately, but in any event it appears that the father of the plaintiff and husband of the purchaser was in undisturbed possession by virtue of the title derived from the foreclosure of the mortgage for a period of about twenty-five years. If any heirs were living the statute would have been against them whether adults or infants. It is a reasonable inference that the purchaser on the foreclosure took possession of the premises, for we find his successor in interest in possession in 1880. If the heirs were of age at the time the purchaser under the decree in foreclosure went into possession, the Statute of Limitations commenced to run at once and would not be suspended by a subsequent devolution of title to infants. (*Jackson v. Robins*, 15 Johns. 169; *Ottinger v. Strasburger*, 33 Hun, 466; *affd.*, 102 N. Y. 692; *Fleming v. Griswold*, 3 Hill, 85; *Swearingen v. Robertson*, 39 Wis. 462; *Becker v. Van Valkenburgh*, 29 Barb. 319.) If the heir was then an infant just born, the running of the Statute of Limitations would be complete after the lapse of thirty-one years. There may be no presumption that the heirs were adults, but there is a presumption that they were not insane or under other disability which is not a normal condition. There is little hardship in this particular case in giving weight to the defense of the Statute of

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Limitations against an action to redeem, in view of the fact that the purchaser is personally familiar with the facts relating to possession for a period of more than twenty-five years, as are the other parties to the action, some of whom, at least, would be available as witnesses.

According to the allegations of the complaint in the foreclosure action the title had escheated to the People of the State. If the owner of the equity of redemption died, as is alleged, without heirs, then his title and interest escheated to the State without any action on the part of the People or their representatives. (*Johnston v. Spicer*, 107 N. Y. 185; Const. 1846, art. 1, § 11; *Ettenheimer v. Heffernan*, *supra*.) It is claimed that the People should have been made a party *eo nomine*. Our attention, however, has not been called to any statute authorizing the plaintiff in a foreclosure action to make the People of the State a party defendant as the owner of the equity of redemption, and of course in the absence of such a statute, the rule is that the People, being the sovereign, may not be sued. It was provided by statute at that time that the People might be made a party to an action in partition of lands held by the People and by individuals as tenants in common (R. S. [5th ed. vol. 3, p. 620; 6th ed. vol. 3, p. 597] pt. 3, chap. 5, tit. 3, §§ 108, 109) and is now so provided in the Code of Civil Procedure (§ 1594), but in view of the rule prohibiting an action against the sovereign, that would not justify making the People a party to a foreclosure action. On application for letters of administration in case of intestacy unless it appeared that the deceased left next of kin entitled to his estate, the statute at that time required that a citation should be issued to and served on the Attorney-General who in cases of escheat appeared for the People. (R. S. [vol. 2, p. 76] pt. 2, chap. 6, tit. 2, § 37; *Gombault v. Public Admr.*, 4 Bradf. 226.) This provision is now contained in section 2663 of the Code of Civil Procedure. (See Throop's Code Civ. Proc. [1880 ed.] § 2663, note and present statute.) Section 2616 of the Code of Civil Procedure which is also partly founded on this provision of the Revised Statutes (Throop's Code Civ. Proc. § 2616, note and present statute), provides for issuing a citation to the Attorney-General, and not directly to the People, in cases of probate of wills relating to real estate, where the heirs of the decedent cannot be ascertained. By amendment to section 1627 of the Code of Civil Procedure, by chap-

ter 528 of the Laws of 1899, authority now exists for joining the People as a party defendant in an action for the foreclosure of a mortgage on real property where they have a subsequent lien, by serving the Attorney-General. If the People could have been lawfully joined as a party defendant I am of opinion that since service might have been made on the Attorney-General, who alone could have appeared for them, what was done in view of his appearance for the People, without questioning the procedure, should be regarded as a sufficient designation of the People as a party defendant, and sufficient service, or at least the appearance should be deemed, presumptively at least, a voluntary appearance for the People, in whose behalf he assumed to appear, and a waiver of any irregularity or defect in the title in the summons. (See *People v. Hydrostatic Paper Co.*, 88 N. Y. 623; *Sperry v. Reynolds*, 65 id. 179; *Brown v. Nichols*, 42 id. 26. See Supreme Court Rules 1871, rule 14, in force at that time.) The Attorney-General had no interest in the suit except in his official capacity as representing the People. Since the People had not consented to be made a party defendant in such a case, the mortgagee, whose rights accrued before the State acquired an interest, would be deprived of his right to foreclose the mortgage and to have the judgment pass good title as against the People, whose rights were subordinate to those of the plaintiff, unless the court of equity devised some plan for giving the People notice and an opportunity not to litigate their title, but to come in and protect it by redeeming or bidding. It appears that a practice was devised by which, where the People had or claimed a lien on premises subsequent or subordinate to the rights of the plaintiff, and in other suits in equity where they were interested, they were given notice by naming the Attorney-General in his official capacity as a party defendant and serving process upon him. (*Varick v. Smith*, 5 Paige, 137; *Garr v. Bright*, 1 Barb. Ch. 157; *Kiersted v. People*, 1 Abb. Pr. 385.) On principle that rule should be applied to a case where the People had become the owners of the equity of redemption.

I am of opinion, therefore, that the title was marketable. I think it falls within the cases holding that where it is possible that a fact exists which would affect the title, but that it is extremely improbable and a remote contingency, the court may compel a

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specific performance. (*Ferry v. Sampson*, 112 N. Y. 415; *Hagan v. Drucker*, 90 App. Div. 28; *Lenahan v. College of St. Francis Xavier*, *supra*; *Cambrelleng v. Purton*, 125 N. Y. 610; *Hamerslag v. Duryea*, 58 App. Div. 288; *affd.*, 172 N. Y. 622; *Empire Realty Corporation v. Sayre*, 107 App. Div. 415.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

Order affirmed, with ten dollars costs and disbursements. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ABRAHAM KOPEL,
Appellant, v. THEODORE A. BINGHAM, Police Commissioner of the
City of New York, Respondent.

First Department, February 8, 1907.

Extradition — requisition from Governor of Porto Rico — what constitutes a "territory" of the United States.

Extradition from the State of New York is governed by the Constitution and statutes of the United States, for upon that subject the individual States do not possess the power of independent nations.

Upon the ratification of the treaty of Paris by which Porto Rico was ceded to the United States that island ceased to be a foreign territory, and when Congress established a civil government with executive, legislative and judicial powers under the control and jurisdiction of the United States, Porto Rico became an organized territory of the United States.

Section 5278 of the United States Revised Statutes provides that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice * * * it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured * * * and to cause the fugitive to be delivered."

Hence, on the requisition of the Governor of Porto Rico for the extradition of a person charged with embezzlement in that island it is the duty of the Governor of New York to issue a warrant for his arrest as provided by section 827 of the Code of Criminal Procedure; and it is not necessary that the extradition be had through the Federal authorities under section 5270 of the United States Revised Statutes which governs extradition to foreign territory.

Irrespective of the territorial status of Porto Rico the requisition should be honored for in 1900 Congress provided (31 U. S. Stat. at Large, 81, § 17) that the Governor of Porto Rico should have "all the powers of governors of the

territories of the United States that are not locally inapplicable," and this would include the power of requisition conferred on such Governors by section 5278 of the United States Revised Statutes.

APPEAL by the relator, Abraham Kopel, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of October, 1906, dismissing a writ of habeas corpus and remanding the relator into custody.

The relator was taken into custody by the police commissioner of the city of New York by virtue of a warrant for his extradition issued by the Governor of the State of New York on the 30th day of July, 1906, upon a requisition from the Governor of Porto Rico. Subsequently the relator obtained a writ of habeas corpus directing the police commissioner to produce the body of the relator at Special Term.

Alfred R. Page, for the appellant.

Robert S. Johnstone, Deputy Assistant District Attorney, for the respondent.

INGRAHAM, J.:

It seems to have been held by the Court of Appeals in *People ex rel. Corkran v. Hyatt* (172 N. Y. 176) that no person can or should be extradited from one State to another unless the case falls within the Federal Constitution or statutes, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the States. The Constitution of the United States provides (Art. 4, § 2, subd. 2) that "a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Under this clause of the Constitution Congress has enacted (U. S. R. S. § 5278) that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled * * * it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured * * * and to cause the fugitive to be delivered."

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Section 5270 (U. S. R. S.) provides for the extradition of fugitives from justice to a foreign country. This section contains a provision that was added in 1900 (31 U. S. Stat. at Large, 656, chap. 793) which provides that "whenever any foreign country or territory or any part thereof is occupied by or under the control of the United States any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses:" (then follows an enumeration of the offenses) "and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. * * * *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. * * * If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States." It was further provided that the provisions of sections 5270 to 5277 (U. S. R. S.) as far as applicable shall govern proceedings authorized by this proviso. These provisions all relate to the surrender of a fugitive from justice by the Secretary of State to the government of a foreign country and have no relation to the surrender of fugitives from justice from one portion of the United States to another.

Section 5278 (U. S. R. S.) provides that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled * * * it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured * * * and to cause the fugitive to be delivered to such agent when he shall appear." This provision of the Revised Statutes was originally passed on February 12, 1793 (1 U. S. Stat. at Large,

302, chap. 7, § 1), and it seems to have been in force from that time to the present.

By section 827 of the Code of Criminal Procedure it is provided that "It shall be the duty of the Governor in all cases where by virtue of a requisition made upon him by the Governor of another State or Territory any citizen, inhabitant or temporary resident of this State is to be arrested as a fugitive from justice * * * to issue and transmit a warrant for such purpose to the sheriff of the proper county * * * (except in the city and county of New York where such warrant shall only be issued to the superintendent or any inspector of police). * * * Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the Governor of this State, such officer must, unless the same be waived as hereinafter stated, take the prisoner or prisoners before a judge of the Supreme Court or a county judge who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest," and that he or they may have a writ of habeas corpus upon filing an affidavit to the effect that he or they are not the person or persons mentioned in said requisition.

The question presented in this case would, therefore, seem to be whether Porto Rico is a State or territory within section 5278 (U. S. R. S.) or a foreign country or territory occupied by or under the control of the United States. In the latter case the extradition must be under the provisions of section 5270 (U. S. R. S.); while if Porto Rico is a territory of the United States the relator may be extradited under section 827 of the Code of Criminal Procedure, to which attention has been called.

The proviso added to section 5270 (U. S. R. S.) by the act of June 6, 1900 (*supra*), was construed in *Neely v. Henkel*, No. 1 (180 U. S. 109). That case presented the question of the apprehension of a fugitive from justice from the island of Cuba, and it was held that Cuba was, at the time that decision was rendered (January 14, 1901), occupied by and under the control of the United States, of which the court would take judicial notice. Attention was then called to the treaty of peace between the United States and Spain, and it was held that under this treaty and the acts of the military

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authorities of the United States under it, the island of Cuba was foreign territory within the meaning of this amendment to section 5270 (U. S. R. S.), and could not be regarded in any constitutional, legal or international sense part of the United States. The court there said: "It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that Island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action. * * * Indeed, the Treaty of Paris contemplated only a temporary occupancy and control of Cuba by the United States."

It seems from the whole discussion in this case that the provision of section 5270 (U. S. R. S.) would not have been applicable if Cuba had become territorially a part of the United States; that the proviso of that section requiring the surrender of public officers, employees or depositaries fleeing to the United States after having committed in a foreign country, or any part thereof, occupied by or under the control of the United States, the crime of embezzlement or criminal malversation of the public funds, had special application to Cuba in its present relation to this country.

By the treaty of Paris, the island of Porto Rico was expressly ceded to the United States. (See 30 U. S. Stat. at Large, 1755, art. 2.) The 9th article of that treaty (Id. 1759) provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States (among others, Porto Rico) shall be determined by the Congress." By section 1977 of the United States Revised Statutes it is provided that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

After the treaty of Paris Congress passed an act for the govern-

ment of Porto Rico. (31 U. S. Stat. at Large, 77, chap. 191.) This act was entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," and created all the inhabitants continuing to reside in Porto Rico, except such as elected to preserve their allegiance to the Crown of Spain, together with such citizens of the United States as resided in Porto Rico, a body politic under the name of The People of Porto Rico, to whom governmental powers were thereafter conferred. It was then provided that all the statutory laws of the United States except the internal-revenue laws should have the same force and effect in Porto Rico as in the United States, and provision was made for the appointment of a Governor by the President, by and with the advice and consent of the Senate, and for a Legislative Assembly, one branch of which was to be elected by the qualified voters of Porto Rico. All laws enacted by this Legislative Assembly were to be reported to Congress, who should have power and authority to annul the same. A complete judiciary system was established with provision for writs of error and appeals to the Supreme Court of the United States in the same manner, under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States.

By the operation of the treaty of Paris the island of Porto Rico, therefore, became territorially a part of the United States. It was ceded to the United States by that treaty, and since that time has been the property of the United States the same as the Northwest Territory became the property of the United States; as the Louisiana Territory became the property of the United States by the treaty with France in 1803; and the territory acquired by the treaty of peace between the United States and Mexico. Upon the organization by the United States of the various governments of each of these territories they became territorial governments under the control of the United States, and under the express provisions of subdivision 2 of section 3 of article 4 of the Federal Constitution, which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," Congress had the power to prescribe such government for these various territorial possessions as seemed to it appropriate to insure good govern-

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ment. When, therefore, Porto Rico was acquired by the government of the United States by virtue of the concession contained in the treaty of Paris, the sovereignty of that island vested in the United States, and Congress had power to provide for its government in such manner as it was conceived would best subserve the principles of the Constitution. When it created such a government under the authority of the United States, providing for the appointment of a Governor by the President and Senate, a legislative body to exercise the legislative powers, and a judiciary to exercise the judicial powers within the territorial limits of the island, I can see no reason why that island did not then become a territory of the United States with the same effect as other territories acquired by the United States and divided into separate territories governed as provided by law. It seems to me that there is no fundamental distinction between a territory organized by the United States from the property acquired from France or Mexico, and the territorial government organized by the United States from property acquired by the United States from Spain by the treaty of Paris. When the United States organized a government for the island of Porto Rico with executive, legislative and judicial powers, a territory was created subject to the jurisdiction of the United States, and thus came directly within the provisions of the laws of the United States relating to territories. Porto Rico has ceased to be a "foreign country or territory," and has become a part of the territory of the United States, and when the United States organized a government under its jurisdiction and control for that island it then became, within the meaning of all provisions of law regulating territories, a territory of the United States.

I think this status of the government of Porto Rico is recognized by the Supreme Court of the United States in *De Lima v. Bidwell* (182 U. S. 1). In the opinion in that case there is a statement of the various territories that have been acquired by the United States and the action of the government in taking possession of and governing these territories until regular territorial governments were established by Congress. After considering the effect of the treaty of Paris, the court said (p. 196): "It follows from this that by the ratification of the treaty of Paris the island

became territory of the United States — although not an organized territory in the technical sense of the word.” That “whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. * * * Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a State upon an equality with other States; it may sell its public lands to individual citizens or may donate them as homesteads to actual settlers. In short, when once acquired by treaty it belongs to the United States and is subject to the disposition of Congress.” And the conclusion of the court was that Porto Rico was not a foreign country but a territory of the United States. Although there was in that case a strong dissent, it was based upon the position taken that Porto Rico occupied a relation to the United States between that of being a foreign country absolutely and that of being a domestic territory absolutely, and because of that relation its product was subject to the duties imposed by the Dingley Act. The whole discussion turned upon the condition of Porto Rico between the time of the ratification of the treaty of Paris and the legislation by Congress establishing a government for that island.

When Congress established a civil government for the island of Porto Rico under the control and authority of the United States, a territorial government was established under which Porto Rico became an organized territory of the United States. It ceased to be a foreign country or territory upon the ratification of the treaty of Paris between the United States and Spain. It became an organized territory of the United States when the United States established a form of government under which the island was to be governed subject to the jurisdiction of Congress and officers appointed in pursuance of law establishing a territorial government.

I think, therefore, it became a territory within the provisions of section 5278 (U. S. R. S.), and it follows that the order appealed from should be affirmed.

MCLAUGHLIN and LAUGHLIN, JJ., concurred.

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PATTERSON, P. J. (concurring):

I concur in the views as expressed by Mr. Justice INGRAHAM, concerning the status of the island of Porto Rico as a territory of the United States; and while it is not expressly decided in *De Lima v. Bidwell* (182 U. S. 1) and *Downes v. Bidwell* (Id. 244), yet it seems to have been assumed throughout the opinions written by the learned justices of the Supreme Court of the United States in those cases that such island is a territory, although not a part of the United States within the revenue clause of the Constitution. I am inclined, however, to the view that it is not necessary to determine on the appeal now pending before us whether the island of Porto Rico is an incorporated territory. It is an organized territory with a government established by the Congress, by a law which it was authorized to enact. "Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (*Downes v. Bidwell*, 182 U. S. 244) that the territory is to be governed under the power existing in Congress to make laws for such territories," etc. (*Dorr v. United States*, 195 U. S. 138, 143.)

It seems to me that the authority of the Congress to legislate for the return of fugitives from justice to the authorities of Porto Rico is to be found in the power last referred to. The question here is whether the Governor of Porto Rico had the right to call upon the Governor of the State of New York for the surrender of the relator, and whether the duty was incumbent upon the Governor of the State of New York to comply with such a demand. The Congress of the United States established a complete governmental scheme for the island of Porto Rico, which included an executive head called the Governor. By an express provision of the law creating that governmental establishment, passed April 12, 1900 (31 U. S. Stat. at Large, 81, § 17), and commonly called the Foraker Act, it is required that the Governor of Porto Rico shall at all times faithfully execute the laws, and he shall in that behalf *have all the powers of Governors of the Territories of the United States* that are not locally inapplicable. By section 5278 of the Revised Statutes of the United States it is enacted that "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such per-

son has fled * * * it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." The Governor of Porto Rico had the power to proceed under this section of the Revised Statutes by force of the terms of section 17 of the act of April 12, 1900.

It is charged against the present relator that he is the subject of a criminal prosecution by "The People of Porto Rico," and the Governor of Porto Rico, being invested by the Congress with the authority of a Governor of a Territory of the United States, has, in the performance of the duty and obligation resting upon him to execute the laws of the island of Porto Rico, demanded the surrender or rendition of the relator to the proper authorities of that island. Unless it must be held that the provisions of section 5278 of the Revised Statutes of the United States are locally inapplicable to the island of Porto Rico, it seems to me that the clear authority for the demand and surrender of the relator is shown to exist by force of the act of the Congress passed in pursuance of its power to legislate. The provisions of section 5278 of the Revised Statutes of the United States are general and relate to all Territories. They are just as applicable to one as to another. They cannot by any proper understanding of language be regarded as only locally applicable to a particular Territory with a permitted particular form of organized or incorporated government.

LAUGHLIN and HOUGHTON, JJ., concurred.

Order affirmed. Order filed.

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OLGA M. TUCK, Appellant, v. HENRY WEBSTER TUCK, Respondent.

First Department, February 8, 1907.

Husband and wife—divorce—admission of adultery by defendant at trial—collusion.

When at the trial of an action for divorce the defendant admits that he committed adultery in company with a detective whom the plaintiff had employed to watch him, and there is evidence that the offense was committed without the consent, procurement or connivance of the plaintiff, and it appears from the defendant's testimony that he acted intentionally and deliberately, judgment for the plaintiff on the report of a referee should be entered.

Moreover, when the defendant has admitted other offenses not committed in company with the detective hired by the plaintiff, and the general allegations of the complaint as to adultery are amended to conform to the proof, the plaintiff is entitled to a decree.

APPEAL by the plaintiff, Olga M. Tuck, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of December, 1906, denying the plaintiff's motion to confirm the report of a referee and for an interlocutory judgment of divorce.

Otto T. Hess, for the appellant.

William M. Sullivan, for the respondent.

INGRAHAM, J.:

This action was for divorce upon the ground of adultery. The complaint alleged that on the 30th day of January, 1906, at the city of Denver in the State of Colorado, and elsewhere, the defendant committed adultery with one Nellie Spencer, and that the defendant at divers other dates and times, and before the commencement of this action, and at divers places, committed adultery with various persons whose names are unknown to the plaintiff. The defendant interposed an unverified answer denying these allegations of the complaint, and the issues upon the consent of the parties were referred to a referee to hear and determine. The trial proceeded before the referee, both the plaintiff and the defendant appearing by counsel. There was evidence before the referee that the adultery alleged to have been committed was without the consent, pro-

curement or connivance of the plaintiff, and that the defendant committed adultery in Denver, Colo. The defendant was then called on his own behalf and testified to facts which would justify a finding that he committed adultery. He testified that the detective who was examined by the plaintiff made his acquaintance there and together they went to a house of prostitution where the defendant stayed all night, and that he returned to the same house on the following night and again stayed all night; that he met this detective again on the following night and went with him to another house of prostitution which was the occasion testified to by the detective. There was no deceit practiced upon the defendant, and it appears from his own testimony that, knowing what he was doing, he intentionally and deliberately committed the offense. The proof, therefore, is not that of the detective and prostitute, but the sworn evidence of the defendant himself as to the commission of the offense. The defendant also testified to his relations with a woman in the city of New York, some time prior to his going to Denver, which would justify a finding of adultery committed in New York at that time.

After the defendant had testified, the plaintiff moved to amend the complaint so as to make it conform to the proof by alleging the commission of adultery in the city of New York, based upon the testimony of the defendant, and this was granted without objection by the defendant.

The referee reported that the defendant had committed adultery in Denver at the time specified in the evidence; and upon this report being presented to the court, the court refused to enter a decree upon the ground that the plaintiff was chargeable with the suggestion made by the detective, and thus the offense in Colorado was with her privity or procurement, and was not sufficient to form the basis of a judgment of divorce. Whatever may be said about the effect of the commission of such an offense, where the defendant is induced to commit it by an agent of the plaintiff under such circumstances as would justify the court in finding that but for such inducement by the agent the offense would not have been committed, in this case it appears from the defendant's own evidence that he understood what he was doing, acted on his own volition, and deliberately and intentionally committed adultery. I

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think upon the evidence of the defendant the court was bound to grant to the plaintiff a judgment of divorce, and that the rule stated by the trial judge was not applicable where the defendant, himself, testified that he intentionally and deliberately committed the act which justifies a divorce. There is nothing to justify a finding that this plaintiff employed the detective to aid or connive at the commission of the offense, or that she ever had any knowledge that he did so, or that either she or her attorney was in any way responsible for his acts. If there was any doubt about the sufficiency of the occurrence in Denver, the defendant's testimony sustained the charge that he had committed adultery in New York, before he went to Denver. This was within the complaint and was sufficient to justify a judgment. The defendant, by his own testimony, is shown to be a dissolute and dissipated man, without any regard for his obligations to his wife, and I think the plaintiff was entitled to judgment.

The order denying the application for judgment is, therefore, reversed, with ten dollars costs and disbursements, and an interlocutory judgment for a divorce granted, with costs.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and judgment ordered as directed in opinion, with costs. Settle order on notice.

CONSTANTINO BUCCOLO, by THERESA BUCCOLO, His Guardian ad Litem, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Respondent.

First Department, February 8, 1907.

Practice — security for costs — prior order permitting plaintiff to sue as poor person.

An order requiring a non-resident plaintiff to give security for costs should be vacated on motion where it is shown that an order permitting the plaintiff to sue as a poor person had been granted before the commencement of the action. The order permitting suit as a poor person can only be vacated upon a motion regularly made for that purpose, and is not invalidated by the failure of the plaintiff to serve a copy thereof upon the defendant.

APPEAL by the plaintiff, Constantino Buccolo, by Theresa Buccolo, his guardian ad litem, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of October, 1906, as denies the plaintiff's motion to vacate an order entered in said clerk's office on the 4th day of October, 1906, requiring the plaintiff to give security for costs.

Morris E. Gossett, for the appellant.

Louis Cohn, for the respondent.

INGRAHAM, J.:

This action is brought to recover for personal injuries alleged to have been sustained by the infant plaintiff by the negligence of the defendant. It was commenced by the service of a summons and complaint on the 29th day of July, 1903, and issue was joined by the service of the defendant's answer on the 11th of August, 1903. Immediately after the action was commenced the defendant endeavored to ascertain the residence of the plaintiff and his guardian, without success. The case was then brought on for trial, which resulted in a disagreement by the jury. On the trial it appeared that the plaintiff and also his guardian *ad litem* had, after the commencement of this action, left the State of New York and then resided in Jersey City, in the State of New Jersey. Upon these facts an *ex parte* application was made for an order requiring the plaintiff to give security for costs, which was granted, whereupon the plaintiff moved to vacate that order upon the ground that before the action was commenced an order had been entered allowing the plaintiff to sue as a poor person. This motion was denied and the plaintiff appealed.

No copy of the order allowing the plaintiff to sue as a poor person had been served upon the defendant, but as long as that order remained in force no costs could be awarded against the plaintiff, and, therefore, no order requiring the plaintiff to give security for costs was proper. The non-service of this order upon the defendant did not invalidate it; and the *ex parte* order requiring the plaintiff to give security for costs, upon the attention of the court being called to the fact that there was an order in existence allow-

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ing the plaintiff to sue as a poor person, should have been vacated. The order allowing the plaintiff to sue as a poor person could only be vacated upon motion regularly made for that purpose. It could not be disregarded, and as long as it stood no order should have been granted requiring the plaintiff to give security for costs.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the order vacating the *ex parte* order requiring the plaintiff to give security for costs vacated, without prejudice, however, to a motion by the defendant to vacate the order allowing the plaintiff to sue as a poor person and, should that order be vacated, to apply for an order requiring the plaintiff to give security for costs.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and order vacating *ex parte* order requiring plaintiff to give security for costs vacated, without prejudice to motion by defendant as stated in opinion. Settle order on notice.

CLENEN BISHOP, Respondent, v. WILLIAM HUGHES, Appellant.

First Department, February 8, 1907.

Judgment on substituted service — when default not opened.

When after diligent effort by the plaintiff to obtain service of summons on the defendant without success, an order for substituted service has been made and judgment in the action has been taken after default, the judgment should not be vacated or the default opened when the defendant's attorney admits that he received the summons and complaint before the entry of judgment, but was unable to communicate with the defendant, who was within the State. An attorney unable to communicate with his client under such circumstances should have appeared and obtained an extension of time to answer.

Although section 445 of the Code of Civil Procedure permits a defendant to be let in to defend, when the proposed answer states no defense, the judgment will not be vacated.

When the complaint, served by substituted service, asked for an injunction compelling the defendant to remove his personal property from the plaintiff's premises and the judgment on default allows excessive money damages, the defendant should be let in to defend the claim for damages unless the plaintiff consent to strike the same from the judgment.

APPEAL by the defendant, William Hughes, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of December, 1906, denying the defendant's motion to vacate a judgment theretofore entered against him by default upon substituted service of summons, or to open such default.

Wayland E. Benjamin, for the appellant.

Paul Armitage, for the respondent.

INGRAHAM, J. :

We think the order for substituted service was regular, it appearing that the plaintiff had made diligent efforts to serve the summons upon the defendant without success, and that knowledge of the whereabouts of the defendant was persistently refused to those seeking to serve the summons, and that, therefore, the judgment entered upon the failure to appear and answer was regular.

The order for substituted service of the summons was granted on June 8, 1906, and on June 11, 1906, the service was made, and on the 12th of June, 1906, a copy of the summons and complaint was mailed to the defendant at his post office address in the city of New York. The defendant's manager admits that he received a copy of the summons and complaint on July seventh, and it was sent to the defendant's attorney, who now appears. The defendant's attorney admits receiving the summons and complaint in July, but alleges that he had difficulty in communicating with the defendant, who was then absent in the Catskill mountains; but it is a little difficult to see why there should have been any difficulty in communicating with defendant at that place. At any rate, the judgment was not entered until the twentieth of July, at which time the defendant had neither appeared nor answered. If there was any difficulty in communicating with the defendant the attorney could have appeared and obtained time to answer. The default was thus entirely unexcused. Section 445 of the Code of Civil Procedure provides that "the defendant or his representative must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after

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personal service of written notice thereof, or if such a notice has not been served, within seven years after the filing of the judgment roll." The proposed answer is made a part of the motion papers, but if upon the conceded facts there was no defense to the action we do not think that the defendant should have been allowed to defend. We think it clear that the plaintiff was entitled to the injunction. It appeared without contradiction that personal property of the defendant had been left upon real property belonging to the plaintiff and that after the thirty-first of January the defendant had no right to continue to use the plaintiff's real property to store these articles of personal property, and that when the demand was made the defendant was bound to remove them. The plaintiff could not destroy defendant's property without subjecting himself to a claim by the defendant for its value, and no way is suggested by which the plaintiff could get rid of this property except by compelling the defendant to remove it, and as he had failed to remove it when the plaintiff demanded that he should, the plaintiff's only relief was an application to a court of justice to compel its removal. The plaintiff, therefore, had a right to apply for this injunction, and upon the conceded facts was entitled to it.

The plaintiff also asks to recover \$1,000 damages caused by the defendant's failure to remove the property, and as to those damages a good defense is interposed. The plaintiff had obtained judgment against the defendant for \$500. The evidence before the referee justifying a judgment for this amount is not satisfactory, and if the plaintiff insists upon enforcing this claim for damages, the defendant should have an opportunity of defending that claim. If, however, the plaintiff is willing to waive his damages, it is quite clear that there will be nothing to try, and the court was justified in denying the motion.

Our conclusion is, that if the plaintiff will stipulate to strike out of the judgment the provision awarding him damages, the motion should be denied, with ten dollars costs and disbursements. If, however, the plaintiff insists upon his claim for damages, then the order appealed from should be reversed and the motion granted, upon payment by the defendant to the plaintiff of sixty-five dollars, the taxed costs and disbursements, the judgment already entered to

stand as security until the final trial of the action, without costs of this appeal to either party.

PATTERSON, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

On plaintiff stipulating as directed in opinion, motion denied, with ten dollars costs and disbursements; otherwise, order reversed and motion granted on conditions stated in opinion. Settle order on notice.

LEO SCHLESINGER, as Receiver of the FEDERAL BANK OF NEW YORK,
Appellant, v. LUDWIG LEHMAIER, Respondent.

First Department, February 8, 1907.

Bills and notes — defense of usury not available against State bank.

A State bank which has discounted promissory notes indorsed in blank by the payee may recover thereon against the maker, although the notes were usurious at their inception. The rule holds not only when such bank accepts the note from the maker, but holds equally where the bank takes the note by indorsement from the payee.

By section 55 of the Banking Law State banks are placed upon an equality with National banks as regards usury, and the only remedy against such bank where an illegal rate of interest has been taken is by a separate action to recover the penalty. The defense of usury cannot be set up as a counterclaim in an action on the note.

A bank which takes a usurious note by indorsement from the payee with knowledge of the usury ratifies the acts of its transferrer and is subject to an action for the penalty.

APPEAL by the plaintiff, Leo Schlesinger, as receiver, etc., from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 13th day of June, 1906, reversing a judgment of the City Court of the city of New York in favor of the plaintiff, entered on the 6th day of February, 1906.

George W. Glaze, for the appellant.

Otto C. Sommerich, for the respondent.

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McLAUGHLIN, J. :

This action was originally brought in the City Court by the receiver of the Federal Bank to recover the amount of two promissory notes made by the defendant for \$500 and \$454.50 respectively, each made payable to the order of the maker and indorsed by him.

The complaint alleges that before maturity the notes were indorsed in blank by the defendant and discounted by the Federal Bank in due course, and that as receiver the plaintiff is the owner and holder of them. The answer denies that the plaintiff is a holder in due course, and alleges :

“ VI. That both the notes described in the complaint were made and delivered to the Globe Security Company under the following circumstances: That on or about the 2d day of November, 1903, the defendant made a note for \$819.50 dated on that day, wherein he promised to pay the said sum four months after said date to the order of the defendant, and thereafter endorsed the said note in blank and delivered the same to the Globe Security Company ; that thereafter, when the said last mentioned note became due, the defendant did not pay the said note, and in payment thereof made and delivered to the Globe Security Company the two notes mentioned in the complaint ; that the said notes mentioned in the complaint, amounting in the total to Nine hundred and fifty-four and 50/100 dollars (\$954.50) and interest include the said sum of Eight hundred and nineteen and 50/100 dollars (\$819.50) and the sum of One hundred thirty-five and 50/100 dollars (\$135.50) interest, the last mentioned, and being far in excess of interest at the legal rate, and said interest is, therefore, at a usurious rate, and the Federal Bank of New York received the notes with knowledge of all facts alleged in this separate defense.”

Another defense is set out similar to the one above quoted, but tracing the notes back to their origin in a note exceeding \$400, made on or about January 29, 1903, for a loan of \$350.

At the trial the plaintiff made *prima facie* proof of the cause of action alleged and rested, and the defendant's counsel thereupon moved to dismiss the complaint upon the ground that the plaintiff had failed to prove that he was the owner and holder of the notes in question. The motion was denied and an exception taken, and a motion

was then made by plaintiff's counsel for judgment upon the ground that the facts pleaded in the alleged defense quoted and the other defense referred to did not, in law, even though such facts be established by evidence, prevent a recovery. This motion was subsequently granted and judgment entered for the plaintiff, from which an appeal was taken to the Appellate Term, which reversed the judgment of the City Court and ordered a new trial, and from the determination thus made, by permission, an appeal was taken to this court.

I am of the opinion that the determination of the Appellate Term should be reversed and the judgment of the City Court affirmed. The Federal Bank, of which the plaintiff is receiver, was a State bank, and the notes in suit were acquired by him as part of the assets of the bank when he was appointed such receiver. The disposition made by the City Court in summarily disposing of the defenses pleaded necessarily admits that the notes sued on were usurious at their inception, and that the Federal Bank took the same with full knowledge of this fact. Had the Federal Bank, in the first instance, discounted the notes and in doing so exacted a usurious rate of interest, or had it taken the notes in due course, then the defenses attempted to be pleaded would not be available. This was finally settled, if the question were theretofore open, by this court in *Schlesinger v. Kelly* (114 App. Div. 546), where the latter question was squarely presented. The reasons assigned for reaching that conclusion are fully set forth in the opinion delivered by Mr. Justice CLARKE, and it is unnecessary in disposing of the question here presented to restate them.

The only difference between this case and the *Kelly* case is that there the Federal Bank did not have knowledge that a usurious rate of interest had been exacted, while here it purchased the notes for value with knowledge that a usurious rate of interest had been exacted by the seller. Does this place the bank in any worse position than if it had taken usurious interest itself? I think not, and this is upon the theory that what one can do himself he can do through another. A national bank may proceed by action to recover a debt and the debtor claiming usury cannot resist the enforcement of that debt because of usury, nor can he counterclaim the statutory penalty. He can only recover that penalty in the manner pro

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vided by statute (*Caponigri v. Altieri*, 29 App. Div. 304; *affd.*, 165 N. Y. 255) which is by a separate and independent action for that purpose and he can have redress in no other mode or form of procedure. (*Barnet v. National Bank*, 98 U. S. 555.) Under the provisions of the National Banking Act (13 U. S. Stat. at Large, 108, § 30; revised by U. S. R. S. §§ 5197, 5198) taking usury by a national bank does not involve a forfeiture of the debt, either as a penalty or otherwise. The most that can be claimed by the debtor is that the contract is good for what might be lawfully taken and void only as to the excess. (*Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 35.) By the act of Congress referred to there is a penalty imposed for taking usury by national banks, but it can only be recovered in an action of debt and not as a counterclaim or set-off to the original obligation. (*Caponigri v. Altieri*, 165 N. Y. 261.)

Section 55 of the Banking Law (Laws of 1892, chap. 689, as *amd.* by Laws of 1900, chap. 310) places State banks on an equality with national banks (*Caponigri v. Altieri*, *supra*) and, therefore, the statute (1 R. S. 772, § 5, as *amd.* by Laws of 1837, chap. 430, § 1) relating to usury is not available as a defense in an action to recover the original indebtedness. The only remedy, where an illegal rate of interest has been taken, is by a separate action to recover the penalty, or, as said by Judge MARTIN in the *Caponigri* case: "Under the State as well as under the Federal law, a debtor claiming that usury has been paid cannot counterclaim the statutory penalty therefor, but his remedy under the statute of 1892, like that under the Federal law, is to bring an action for the penalties thus imposed, when the action may be tried untrammelled by and disconnected from any other transactions or business between such person and the bank or individual banker."

But it is said that the bank here did not take an illegal rate of interest, but that was taken by the Globe Security Company, from whom it obtained the notes in suit and, therefore, an action to recover this penalty could not be maintained against the Federal Bank or the plaintiff, its receiver. This does not necessarily follow, because the Federal Bank purchased with knowledge that a usurious rate of interest had been paid, and in doing so, it ratified and adopted the act of its assignor, and to the extent of the illegal rate of interest exacted, thereby it seems to me subjected itself to the penalty provided by statute. It is not disputed but what, under

the authorities cited, if the bank had taken the illegal rate of interest itself it could enforce collection of the notes. It would be a forced, strained and unwarranted construction of the statute which would prevent a recovery by reason of the knowledge of the bank that an illegal rate of interest had been taken when, if it had taken the illegal rate of interest itself, a recovery might be had. It could, as already said, do through another what it could do itself, but if it chose to do so it thereby became subject to the penalty which would be imposed had it done the illegal act itself.

For the reasons stated, therefore, the determination of the Appellate Term must be reversed, with costs, and the judgment of the City Court affirmed, with costs.

LAMBERT, J., concurred ; PATTERSON, P. J., HOUGHTON and SCOTT, JJ., concurred in result.

Determination reversed, with costs, and judgment of City Court affirmed, with costs. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MANNIE GLUCK, Appellant.

First Department, February 8, 1907.

Crime—grand larceny in the second degree—evidence—character of defendant impeached by questions as to specific acts.

The defendant was convicted of grand larceny in the second degree for failing to pay for or return upon demand a diamond ring which he had purchased on conditional sale. The defense was that the diamond was not of the weight represented by the complainant, but in this respect the defendant was contradicted by the contract of conditional sale. It was shown that he had paid the first installment by a check which was uncollectible, and had refused to return the ring upon demand. On all the evidence,

Held, that the judgment of conviction was right and should be affirmed:

That as the defendant did not make the payment at the time the ring was delivered, nor return the same when demanded, he was guilty of larceny under section 528 of the Penal Code.

When a defendant in a criminal action has offered himself as a witness, the prosecution on cross-examination may prove specific acts tending to discredit him or impeach his moral character. Thus, he may be asked if he had not

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been engaged in selling worthless steamship tickets to poor immigrants. There is a distinction between evidence of previous arrest, indictment or accusation of wrongful acts, and evidence of the commission of the wrongful acts themselves. It is only evidence of the former character that the authorities condemn, and it is well settled that acts showing disregard of law and contempt of the rights of others may be shown on cross-examination to affect the credibility of the witness and impeach his moral character.

PATTERSON, P. J., and HOUGHTON, J., dissented, with opinion.

APPEAL by the defendant, Mannie Gluck, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, entered on the 4th day of October, 1906, convicting the defendant of the crime of grand larceny in the second degree.

Isadore L. Pascal, for the appellant.

E. Crosby Kindleberger, for the respondent.

MCLAUGHLIN, J.:

The defendant appeals from a judgment convicting him of the crime of grand larceny in the second degree upon which he was sentenced to a term of imprisonment in State's prison of not less than one nor more than four years.

The validity of the judgment appealed from is attacked principally upon the ground that, taking all the evidence together, it is insufficient to sustain the finding of the jury that the defendant was guilty of the crime charged and for which he was convicted.

The evidence, in substance, tends to show that on the 4th of January, 1906, the defendant went to the place of business of the complaining witness (one Behrens) for the purpose of purchasing, as he said, a diamond ring, and on being shown several loose stones, selected one to be set in a ring; that the stone thus selected was set in a ring and on the following day Behrens delivered it to the defendant, who at that time signed a memorandum stating that one fourteen-karat solid gold tooth ring, Roman colored, set with solitaire diamond, weighing $3\frac{1}{4}$ L. $1\frac{1}{16}$ 1/64, value \$175, was consigned by John Behrens & Co. to defendant, returnable on demand; that the same was not sold, nor did title thereto pass; that the conditions on which the consignment was made were in writing, which the defendant read carefully before he signed the

same, and received the ring; that concurrently with the execution of this writing another one was signed by defendant, stating that he was to deposit with Behrens & Co. \$30 on the execution of the agreement and certain sums on certain dates thereafter, until the total deposits amounted to \$175, when Behrens & Co. were to deliver to him one diamond ring; that all the deposits then made were to become the property of Behrens & Co., who, in case defendant defaulted in any payment, was to deliver an article of the same nature, reasonably worth the sum deposited.

It was also made to appear that at the time the ring was delivered to the defendant he gave to Behrens & Co., or Behrens, the complaining witness, five dollars in cash and a check of a third party, payable to his own order, and which was indorsed by him, for twenty-five dollars, which was not paid, the same being returned to Behrens marked "N. G.;" that subsequently Behrens, in the presence of his son, demanded the return of the ring, and the demand was refused.

The material part of the evidence offered on the part of the People was not disputed, but the defendant testified that when he purchased the ring Behrens weighed the diamond selected and told him it weighed a karat and a quarter, and that after the ring had been delivered to him he ascertained, by having it weighed, that this was not its correct weight and he thereupon stopped payment of the check referred to and refused to make further payments; that subsequently he offered to return the ring if Behrens would give back the five dollars he had paid and return the check. This Behrens denied, and he was corroborated by his son as to the conversation which took place at the time the demand was made for the return of it, after the check had been dishonored. That a demand was made for the return of the ring was not denied by the defendant.

This, in substance, is the testimony offered by the respective parties, from which it appears that the defendant signed a memorandum at the time he accepted the ring, which showed the weight of the diamond to be a little less than three-fourths of a karat. It was, therefore, unnecessary for the defendant to apply to other jewelers to ascertain the weight of the stone, nor could he in any way have been deceived upon that subject. He knew from

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the statement signed that the stone was not represented to weigh one and one-quarter karats, and, therefore, the jury was justified in finding that his stopping payment of the check was not for the reason assigned by him, but in pursuance of a purpose to obtain possession and keep the ring without paying for it.

The charge of the learned trial court was as favorable to the defendant as could be reasonably asked. He charged the jury that it must acquit if it reached the conclusion that the defendant offered to return the ring, or if he did not receive it as bailee. The defendant obtained the ring from Behrens & Co. He did not pay for it, and it was specifically agreed that until the deposits amounted to the price asked, viz., \$175, the title to the ring was to remain in Behrens & Co., to whom the same should be returned on demand. He did not make the payment agreed at the time the ring was delivered, nor did he return the ring when demanded. Having failed to return the ring when demanded, he was, under the provisions of section 528 of the Penal Code, guilty of larceny.

The judgment of conviction, therefore, should be affirmed unless there is merit in defendant's contention that errors were committed in the admission of evidence. During the defendant's direct examination, he testified that he had been arrested in connection with a ticket agency of a steamship line but was discharged. On cross-examination he was asked, and permitted to answer against objection and exception, if the steamship ticket business that he was connected with was not that of selling to poor Jewish immigrants worthless orders for steamship tickets and if he did not receive, in one instance, eighty-three dollars for selling worthless orders for such tickets. To the first question he answered that he did not get money on false tickets from any one, and to the second question, that he sold an order for tickets which would be honored. He contends that his exception in each instance was well taken.

I am of the opinion that the ruling was proper and the evidence admissible. The defendant having offered himself as a witness, the People had a right to prove specific facts which tended to discredit him or to impeach his moral character. (*People v. Irving*, 95 N. Y. 541; *People v. Webster*, 139 id. 84.)

In holding that the admission of this evidence was not error, the cases cited by the appellant have not been overlooked, but the dis-

inction between evidence of previous arrest, indictments or accusations of wrongful acts and evidence of the commission of the wrongful acts themselves is apparent. It is only the admission of evidence of the former character that the authorities condemn; on the other hand, the rule is well settled that acts showing disregard of law and contempt for the rights of others may be shown on cross-examination to affect the credibility of the witness and to impeach his moral character, and the questions here propounded tended to elicit evidence bearing on such subjects. (*People v. Irving, supra*; *People v. McCormick*, 135 N. Y. 663.)

The judgment of conviction is right and should be affirmed.

INGRAHAM and LAMBERT, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., dissented.

PATTERSON, P. J. (dissenting):

I dissent from the decision of the majority of the court affirming the judgment in this case. The defendant was convicted of the crime of grand larceny in the second degree. There were two counts in the indictment, the first charging the defendant with feloniously stealing, taking and carrying away a finger ring of the value of \$175, the property of one John Behrens. In the second count he was charged with having in his custody as bailee the same property referred to in the first count, and with feloniously appropriating the same to his own use with the intent to deprive and defraud the said John Behrens of the same and of the use and benefit thereof. On the trial, the case was submitted to the jury upon the second count.

I am of the opinion that the evidence is insufficient to sustain the conviction, in that it fails to show that the defendant retained the property with the intent to deprive and defraud the true owner of the same. The underlying facts of the case are plain. The defendant and John Behrens had negotiations respecting the sale by the latter to the former of a diamond ring. Those negotiations resulted in an arrangement by which the ring was to be delivered to the defendant. He paid five dollars in money and indorsed and delivered to Behrens a check of a third party for the sum of twenty-five dollars. At the same time two papers were signed by the defendant, in one of which it is provided that "The under-mentioned goods are con-

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signed to you to be returned within . . . or upon demand. None of them are sold nor does the title thereto pass. Conditions and agreements not expressly herein included shall not be considered as part hereof. All risks are assumed by the consignee. 1 14Kt. Solid Gold Tooth Ring Roman colored, set with solitaire diamond weighing $3/4$ (less) $1/16$ $1/64$ value 175." At the same time, another paper was signed, termed a deposit agreement, and under which the defendant agreed to pay Behrens thirty dollars upon the execution of the paper, eight dollars on January thirteenth, and three dollars each week, beginning on January 15, 1906, until the sum so deposited amounted to one hundred and seventy-five dollars. The agreement then proceeded to state that: "It is further expressly agreed that if the first party (the defendant) at any time defaults any of said deposits, the second party (Behrens) may deliver to the first party articles, as near as may be, of the same nature, manufacture and style as the chattels herein agreed to be delivered but reasonably worth the sums so deposited, and upon delivery thereof, this agreement shall be deemed fulfilled and satisfied, and it is further agreed that conditions and agreements not expressly included herein shall not be considered as a part hereof."

The transaction took place on the 5th of January, 1906. On January sixteenth, Behrens, with his son, called on the defendant at his place of business and then said to him: "The Court requires me to make a personal demand upon you in the presence of a witness, and I now demand the return of this diamond ring," holding the memorandum in his hand at the time, and the defendant said: "All right, I accept your demand." Behrens testified that that was all that was said. "He did not give me my ring." In the meantime, and after the five dollars was paid and the twenty-five-dollar check given, the defendant claims that he discovered that the diamond in the ring was not of the quality represented by Behrens when he sold it, and that thereupon he, the defendant, stopped the payment of the check. When the return of the ring was demanded by Behrens the defendant said: "All right, I accept your demand." He did not refuse, therefore, to give up the ring. He swore that he stated that he would give it up upon the five dollars and the twenty-five-dollar check being returned. That is denied, it is true, by Behrens and his son, but criminal intent cannot necessarily be

inferred from his mere neglect to return the ring. It had come into his possession lawfully, and Behrens expressly agreed that if the defendant made default in any of the deposits, he, Behrens, "may deliver to the first party articles, as near as may be, of the same nature, manufacture and style as the chattels herein agreed to be delivered but reasonably worth the sums so deposited." This stipulation cannot be regarded as leaving it altogether optional with Behrens whether he would deliver to the defendant merchandise of the value of five dollars or of twenty-five dollars; but, at all events, the defendant might be justified in believing that before the ring was returned by him, he was entitled to something as an equivalent for the money he had paid on account of the transaction. He might well have believed that before the return of the ring could be exacted or compelled, Behrens ought to satisfy him in some way for the money paid on account. There is nothing in this evidence to indicate an original purpose on the part of the defendant to procure possession of the ring by fraud, artifice or deception, and its conversion subsequently with a felonious intent is not satisfactorily established.

I think the judgment should be reversed and a new trial ordered.

HOUGHTON, J., concurred.

Judgment affirmed. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MICHAEL J. GANNON, Relator, v. WILLIAM McADOO, as Police Commissioner of the City of New York, Respondent.

First Department, February 8, 1907.

Municipal corporations — certiorari to review dismissal of police officer — facts not warranting dismissal.

Certiorari to review proceedings had on the dismissal of a police officer in the city of New York, who was charged with neglect of duty and conduct unbecoming an officer. On the charge that the officer had been absent from his post and had neglected to report his absence it appeared that he had absented himself from his post for three minutes by reason of information given to him that his brother was in a hospital suffering from a fractured skull. It also appeared

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in regard to his failure to enter his absence from duty on the books at the station house, that as soon as he reported there he was ordered to report forthwith at another place, and that in going to his assignment he stopped for a few minutes to take food and proceeded by surface car which was delayed. On all the evidence,

Held, that neither the three minutes' absence from duty under the circumstances, nor his failure to enter his absence on the police records was ground for dismissal;

That the delay in arriving at the place where he was ordered to report was excusable;

That the fact that the officer when reporting to headquarters by telephone in respect to a crime did not state that he was a patrolman was not ground for dismissal, there being no rule requiring him to make that statement;

That while the statute vests discretion in the police commissioner to determine the punishment to be inflicted on officers, the charges must be substantial and sustained by the evidence, and the extreme penalty should not be imposed for a mere technical violation of a rule whereby the rights of the department have not been prejudiced.

CERTIORARI issued out of the Supreme Court and attested on the 7th day of July, 1905, directed to William McAdoo, as police commissioner of the city of New York, commanding him to certify and return to the office of the clerk of the county of New York, all and singular his proceedings had in relation to the dismissal of the relator from the police force of the city of New York.

Joseph S. Frank, for the relator.

Theodore Connolly, for the respondent.

McLAUGHLIN, J. :

Michael J. Gannon, the relator, who had been a member of the police force of the city of New York for upwards of fifteen years, was charged with neglect of duty, conduct unbecoming an officer and violation of the rules of the police department. The specifications were, in substance, (1) that between nine-thirty and ten-thirty A. M. of March 11, 1905, the relator was absent from his post and in the hallway leading to a liquor store at No. 4154 Broadway during his tour of patrol duty, which was from eight A. M. to four P. M.; (2) that at the time of such absence the relator willfully concealed his identity as a patrolman in a conversation over the telephone with Inspector Brooks; (3) that between the said hours of nine-thirty and ten-thirty A. M. the relator threatened Patrolman

Powers by stating to him over the telephone, "When I run across you, you can expect what you'll get from me;" (4) that at the expiration of his tour of patrol duty at four-forty P. M. on the day named the relator neglected to report his absence from post in violation of rule 46c; (5) that having been directed at the above hour to report forthwith at the office of Inspector Cross the relator neglected to report as ordered and failed to do so until six-three P. M.; (6) that on being asked by Inspector Cross his reason for not explaining to Inspector Brooks in his conversation with him over the telephone that he was a patrolman the relator falsely stated that he did inform Inspector Brooks of that fact.

The relator was found guilty of the charges and of each specification after a trial before the third deputy police commissioner, who thereupon recommended his dismissal from the police force. The findings were approved by the police commissioner and the relator dismissed from the department. He instituted this proceeding by writ of certiorari for the purpose of having the determination of the commissioner reviewed.

The record is quite voluminous, and while the evidence as to what took place the day preceding the relator's alleged breach of discipline is conflicting, there is little or no conflict except as to the third specification. On the morning of March 11, 1905, while the relator was performing his patrol duty, a boy named Cunningham informed him that the previous afternoon he had witnessed a number of policemen indulging in target practice, the bullets from their pistols falling in the neighborhood of certain work which Patrick J. Gannon (relator's brother) was superintending; that when the latter requested the officers to desist, one of their number assaulted him, fracturing his skull and breaking his nose; that the injured man was then in the J. Hood Wright Hospital. On hearing this story, the relator went to the nearest public telephone, at No. 4154 Broadway, and called up police headquarters, telling the operator that he was "Michael J. Gannon, * * * patrolman, attached to the 33d Precinct," and repeated the story told him by the boy. The operator said: "Hold on, I will give you the general Inspector," which he did, and the relator then told the story to Inspector Brooks, giving his name and address in response to the latter's inquiry, but not again stating that he was a patrolman. On return-

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ing to the station house, situate at One Hundred and Fifty-second street and Amsterdam avenue, at the expiration of his patrol duty, the relator was immediately directed to report to Inspector Cross, at the Twenty-ninth precinct station, One Hundred and Fourth street, near Third avenue, and at once left to obey the order — the time then being four-forty-six P. M. On the way he stopped for five or six minutes at a bakery to get something to eat, having been without food since seven o'clock in the morning, and arrived at the station house at twelve minutes of six, but Inspector Cross being engaged, he was unable to see him until six-three. In reply to inquiries made by Inspector Cross, the relator stated that he had conversed with Inspector Brooks over the telephone, and had informed him that he was a patrolman; that he had not at that time reported his absence from his post, but that he had intended to do so as soon as he returned to the station house, which he did at eight o'clock that evening.

In regard to the third specification, the relator denied having used the language complained of or having telephoned Patrolman Powers at all, while the specification is sustained by the testimony of Powers and another policeman. It is upon evidence establishing substantially the above facts that the finding of guilty is based. A portion of the testimony taken at the trial related to what took place on the tenth of March (the day preceding the one on which complaint was made of relator's action). This evidence on the part of the relator tends to show, through the testimony of the boy Cunningham, two other boys and three adult citizens, that during the afternoon of March tenth some thirty-three or forty policemen were shooting at a mark in the neighborhood of a railroad tower house in a lot between One Hundred and Forty-seventh and One Hundred and Forty-ninth streets, where they were accustomed to gather during the continuance of a strike then in progress on the subway; that the laborers employed by the relator's brother, working in that immediate vicinity, refused to continue their work unless the firing ceased; that the relator's brother remonstrated with the policemen and endeavored to get them to stop firing; that in doing this he was assaulted by a patrolman named Powers, arrested, taken to the station house and subsequently admitted to bail; that of these facts the relator had no knowledge until the following morning, when he was informed of them by Cunningham, who had been sent by

an employee of his brother's to tell the relator. The testimony given by several policemen in behalf of the respondent was to the effect that there was no shooting as alleged; that the relator's brother was arrested for attempting to break through the police lines; that he became intoxicated after he was bailed out and sustained his injuries that evening by falling down the stairs of a saloon, and that the relator was informed of his injuries shortly after midnight of the tenth.

This evidence is conflicting, but it is of no importance, because it neither tends to prove nor disprove the charges made against the relator, and of which he was found guilty.

The first specification is that the relator was absent from his post for some time between nine-thirty and ten-thirty o'clock on the eleventh of March. The fact is not disputed that he absented himself from his post for three minutes by reason of information given to him that his brother was in a hospital suffering from a broken nose and fractured skull. It is true there is some evidence that he had been previously informed of his brother's injury, but such evidence is unreliable and of the most uncertain character. And, besides, the relator's action when informed by the boy Cunningham of the injury to his brother would seem to indicate that he did not prior thereto have such information. The fact, therefore, that the relator, when informed of the serious injuries to his brother, absented himself for three minutes from his post, by going to the nearest telephone and communicating with a superior officer, to the end that the person who had inflicted the injuries might be apprehended, is not such a violation of duty or breach of discipline as to justify his dismissal from the force.

If a patrolman has information which he deems reliable, that a serious crime has been committed, it is his duty to apprehend the criminal, or, if he cannot do so himself, to communicate with some other officer who can. In this connection the fourth specification should be considered, and that is that the relator did not report his absence from post at the expiration of patrol duty. But at that time he was confronted with an order to present himself *forthwith* to Inspector Cross, and it might be well to here consider the fifth specification, which is that the relator did not report *forthwith*, as ordered, or until six-three. The relator is thus blamed for not

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having delayed in the station house to perform one duty before carrying out another order, and at the same time criticised for having delayed at all in obedience to that order.

Rule 46c should be fairly and reasonably construed, having in view, of course, the object sought to be accomplished by it. Can it fairly be said that a patrolman has violated that rule because he has not entered in the proper book his absence from post when, as soon as he enters the station house, he is confronted by an order from his superior officer to forthwith report at another place? Is it unreasonable, if an officer receiving such an order, delays making the entry required by rule 45c until he has complied with the order? I think not. And in this connection it is to be borne in mind that rule 46c does not specify any time when the entry shall be made, though a fair construction of it doubtless requires that the patrolman shall make the entry within a reasonable time after he gets to the station house.

As to the fifth specification — that the relator did not forthwith report to Inspector Cross, as directed — the evidence shows that it took the relator a few minutes less than an hour to go from the station house at One Hundred and Fifty-second street and Amsterdam avenue to the station house at One Hundred and Fourth street and Third avenue, and that he stopped on the way for a glass of milk and a roll, having had nothing to eat since seven o'clock in the morning. But it was not unreasonable, under the circumstances, that he should stop long enough to get a glass of milk and a roll. It would be subjecting an officer to unreasonable discipline to dismiss him from the force if, under the facts here disclosed, he should drink a glass of milk and eat a roll before responding to an order similar to the one in question. It was not unreasonable, in view of the fact that when the strike referred to commenced the relator was on the sick list, and he voluntarily asked to be put back on the force, in view of the increased demand for patrolmen, and that he had eaten nothing since morning. Besides, the evidence shows that he took a car immediately thereafter, and that the car was delayed on the way. That there was no great delay in the relator's getting to the station house is evidenced by the fact that the two officers whom Inspector Cross detailed to go over the route took twenty-five minutes in one instance and thirty-eight in another.

The difference in the time required on these two occasions indicates, as clearly as anything can, the injustice of dismissing a man from the force who has satisfactorily performed his duties for fifteen years because he took nearly an hour.

As to the second specification — that the relator did not disclose when talking with Inspector Brooks that he was a patrolman — a complete answer to this is that there was no rule which required him to disclose that fact. But the evidence fairly shows that he did disclose it. It is undisputed that he stated to the telephone operator at headquarters that he was a patrolman, giving his name and address, and he had a right to assume, when he had stated that fact to the operator, and the operator had announced he would call up Inspector Brooks, that the information which he had disclosed as to his identity had been given to Inspector Brooks, and it was unnecessary for him to repeat it. Besides, what possible motive could he have had in concealing the fact of his connection with the police force? However, if he did so, he violated no rule of the department, nor has any one sustained any injury by reason of it.

As to the sixth specification — that the relator falsely stated to Inspector Cross that he did tell Inspector Brooks he was a patrolman — it cannot, for the reasons already given, be considered a false statement, inasmuch as he had a right to assume that the operator had told Inspector Brooks who wanted to talk with him.

The third specification presents the only one in which there is a direct conflict in the testimony. This charge is only sustained by the testimony of Officer Powers, corroborated in a slight degree by Officer Stevens, and it must be remembered that Powers is the officer who arrested, and it is claimed assaulted, relator's brother, and besides, Officer Stevens contradicts Powers' testimony in several material respects. The relator denied that he used the language attributed to him, and he is corroborated by at least one witness. The evidence does not satisfactorily establish the charge, and if it did it is too trivial in its nature to justify the severe punishment here imposed. It is unquestionably true that the charter (Laws of 1901, chap. 466, § 302) vests the discretion in the police commissioner — where a member of the force has been found guilty of charges preferred against him — of determining the punishment to be inflicted, but the charge must be substantial and fairly sustained

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by evidence. It cannot be that the Legislature intended, when lodging this discretion with the police commissioner, that the extreme penalty should be visited upon a police officer for what at most is a mere technical violation of a rule which is not shown to have prejudiced any right of the department. (*People ex rel. Devaney v. Greene*, 89 App. Div. 296.) The facts here proved do not establish a conscious violation of any rule or the omission of any duty on the part of the relator, or any intent on his part to deceive his superior officer or any one else, and it cannot be that a conviction of neglect of duty, conduct unbecoming an officer, and violation of the rules of the department can possibly be sustained upon the evidence set out in this record without doing manifest injustice. (*People ex rel. Rear-don v. Partridge*, 86 App. Div. 313; *People ex rel. Hogan v. French*, 119 N. Y. 493.)

Here, as already indicated, this officer had been a member of the police department for upwards of fifteen years. His record, so far as appears, is good, and if appeals to this court are to be anything more than a form, I do not see how it can be said, upon this record, that the dismissal of the relator can be sustained.

I am of the opinion that the writ should be sustained, the proceedings annulled, and the relator reinstated, with fifty dollars costs and disbursements.

PATTERSON, P. J., INGRAHAM, HOUGHTON and LAMBERT, JJ., concurred.

Writ sustained, proceedings annulled and relator reinstated, with fifty dollars costs and disbursements. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LEO BISHOP,
Respondent, v. ISAAC C. BISHOP, Appellant.

First Department, February 8, 1907.

**Infants—habeas corpus to deprive parent of custody of daughter—
effect of daughter's marriage.**

When a son applies for a writ of habeas corpus to deprive his father of the custody of a daughter, who is alleged to be illegally restrained of her liberty and kept in a house where the father is alleged to be living in adultery, and on the return of the writ the daughter makes an affidavit that she is over

eighteen years of age and has a happy home and is receiving an excellent education and desires to live with her father, and that her other relatives are almost strangers to her and not congenial, and that she is not restrained of her liberty, and the charges against the father are unsupported by the evidence, the writ should be dismissed.

In any event, the marriage of the daughter prior to the confirmation of a report granting the writ disposes of any question as to the daughter's custody, and the court is without power to make a *nunc pro tunc* order depriving the father of her custody.

APPEAL by the defendant, Isaac C. Bishop, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of April, 1906, confirming the report of a referee and sustaining a writ of habeas corpus, and also from an order entered in said clerk's office on the 13th day of June, 1906, denying the defendant's motion to vacate the above order and dismiss the writ and amending said prior order.

Charles O. Maas, for the appellant.

Edward J. Newell, for the respondent.

MOLLAUGHLIN, J. :

The relator is the son of the appellant. In November, 1904, the son presented a petition praying for a writ of habeas corpus, in which he stated that his sister Miriam was being illegally restrained of her liberty by her father. The alleged illegal restraint consisted, in substance, in keeping Miriam, against her will, in a house in which the father was alleged to be living in open adultery with one Sarah Hess. The mother of Miriam is, and for the past fourteen years has been, in an insane asylum, being hopelessly insane.

In the return to the petition for the writ the father denied that he was living with Sarah Hess in the manner alleged and asserted she was simply acting as his housekeeper, and he also denied that the daughter Miriam was restrained of her liberty. Attached to and made a part of the return was an affidavit of the daughter in which she stated she was over eighteen years of age ; that she had a happy home ; that she was receiving an excellent education, being at the time a member of the junior class of the Girls' Technical High School of the city of New York ; that her social surroundings

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were pleasant and all that she desired; that she was of the age of discretion, and able to take care of herself; that it was her desire to live with her father; that the members of the families of her brothers were almost strangers to her; that none of them was congenial; that she was in no way restrained of her liberty; that it was her irrevocable desire to live with her father, and she prayed that her brother Leo might not succeed in his efforts to take her away from her father, who had always been affectionate, loving and kind to her.

A traverse was filed to the return, in which the relator admitted the good qualities of the sister Miriam, and alleged it was to prevent her being ruined that he desired to take her away from her father.

Upon the issue thus formed the matter was sent to a referee to take proof and make a report. The order of reference is dated February 6, 1905. The referee made a report in July following, in which he stated that Miriam was a very intelligent girl; that though upwards of eighteen years of age, and it was her wish to remain with her father, nevertheless, she should be taken from him and given to the petitioner Leo, her brother, or to her aunt, Sophie Bishop, as Miriam might elect, or in case she did not elect, then to such person as the court might direct.

Subsequently a motion was made by the relator to confirm the report of the referee, and on April 7, 1906, the learned justice who made the order of reference inserted a memorandum in the *New York Law Journal* to the effect that the facts revealed by the evidence convinced him that the welfare of Miriam required that the recommendations of the referee should be adopted and his report confirmed. On the day following, Miriam married one Julius Hirsch, of which fact the learned justice referred to was informed on the eleventh of April, and before any order had been signed, notwithstanding which fact he, on the twelfth of April, made an order confirming the referee's report sustaining the writ and awarding the custody of Miriam to either Leo or her aunt, or in case she did not elect which one she preferred to live with, then to such person as the court might direct, and restraining the father from seeing or receiving Miriam in the presence of Sarah Hess.

After this order had been made, the father moved to dismiss the proceeding on the ground that it had abated by the marriage of Miriam and also to vacate the order of April twelfth. This motion

was denied, but the court amended the order of April twelfth so as to make the date *nunc pro tunc* as of April sixth, two days prior to the marriage of Miriam, and also striking from it the provision directing the production of Miriam in court and directing the appointment of a guardian. In other respects the order was left as originally made. It is from both of these orders that the present appeal is taken.

There never was any occasion for the reference. Here was a girl upwards of eighteen years of age, bright and intelligent. Her mother was in an insane asylum. She had, from infancy, lived with and been cared for by the father. Her surroundings, according to her own affidavit, were pleasant and all that she desired. She was receiving an excellent education and being cared for, so far as the return and her own affidavit show, in a proper way. She did not desire to live with her brother, the relator, or any of her relatives except her father. Indeed, so far as appears, none of her relatives, except her father, had been at all solicitous as to her care after the mother was committed to an insane asylum until this proceeding was instituted. The fact was not disputed that she had been well brought up and was well educated for a girl of her age, and simply because the father was unfortunate enough to have an insane wife, which necessitated, under the circumstances, if he kept house, his having a housekeeper, was no reason why his daughter should be taken from him because someone might imagine (even though it be his own son) that his relations with the housekeeper were meretricious. The proceeding, therefore, should have been dismissed upon the return and the papers annexed to it. The motion to confirm the referee's report should have been denied, and the proceeding dismissed upon the evidence taken by him. This evidence falls far short of establishing that the relations existing between the father and housekeeper were meretricious, or that the morals of the daughter were in any way endangered by living with the father; on the contrary, the uncontradicted evidence shows that the daughter Miriam was then over twenty years of age; that she had received a good education and is bright and intelligent; that she was not restrained of her liberty and did not wish to live with her brother Leo or her aunt, or with any one except her father, who had always looked after her carefully and treated her with great kind-

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ness. That the court, under such circumstances, should prevent her living with the father and compel her to live with her brother or aunt or some person whom the court might designate is a proposition novel, if not startling. And equally novel is the proposition that the court, after it had been advised of the fact that Miriam had married, should make an order *nunc pro tunc* as of a date prior to the marriage, confirming the referee's report and restraining the father from seeing the daughter in the presence of Sarah Hess, even though the husband should insist upon it, or should insist upon living in that household. The marriage of Miriam would seem to have disposed of any question which might under any circumstances have theretofore existed as to her custody. (*Brown v. Rainor*, 108 N. C. 204.) Whether it did or not, upon the evidence taken by the referee, the motion to confirm his report should have been denied.

The orders appealed from, therefore, should be reversed, with ten dollars costs and disbursements, the motion to confirm the referee's report denied, and the proceeding dismissed, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and HOUGHTON, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements, motion to confirm referee's report denied and proceeding dismissed, with ten dollars costs. Order filed.

HENRY M. BLACK, Appellant, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

First Department, February 8, 1907.

Insurance — change of beneficiary procured on forged documents — when assignee of insured not entitled to recover.

In an action to recover upon two duplicate policies of life insurance, of which the plaintiff was assignee, it appeared that the policies were originally issued to the insured, payable to his wife, and in case of her death to her children; that the wife died, leaving one son surviving, and that thereafter the defendant insurance company issued a paid-up policy in place of one of the former policies, payable to the same beneficiaries; that thereafter the insured presented affidavits, verified by himself, stating that his safe had been broken into and the policies stolen, and requesting the issue of duplicates, which statement

that the policies were stolen was untrue, they being at the time in the possession of the son of the insured, who was the ultimate beneficiary. The defendant company issued duplicate policies on receiving bonds of indemnity from the insured and beneficiary, but the signature of the latter was forged. Thereafter the insured applied to the plaintiff for a loan on the policies, and the plaintiff required that the beneficiary be changed so that the policies should be payable to the insured or his estate, whereupon the plaintiff and the insured presented to the defendant company the duplicate policies, with instruments purporting to be signed by the insured and the beneficiary, asking that the beneficiary be changed. The signature of the beneficiary, however, was a forgery. Relying upon such documents, the beneficiary was changed and the change indorsed upon the policies, whereupon the plaintiff, on behalf of a third person, loaned the insured money on the policies and took an assignment thereof to the third person as collateral security. The beneficiary, on requiring the payment of dividends, was informed of the assignment by the insured, and he thereupon notified the defendant that he was the owner of the policies, and that the instruments purporting to be signed by him were forgeries. The third person assigned his interest in the policies to the plaintiff, who had guaranteed the payment of the loan when it was made. Thereafter the insured died and the beneficiary recovered on the original policies in an action in another State.

The plaintiff as assignee bringing action against the insurer on the duplicate policies, it was

Held, that a dismissal of the complaint was proper as the plaintiff when he took the assignment from the third person had information of the fraud and forgeries committed by the insured, and because instead of recalling the loan and prosecuting the insured, he was instrumental in having the loan renewed;

That the plaintiff as assignee was not an innocent holder in good faith;

That the defendant insurance company was not estopped by its act in changing the beneficiaries inasmuch as the change had been induced by the acts of the plaintiff;

That, as the insurer was not liable to the insured by reason of the fraud, it was not liable to the assignee of the insured.

APPEAL by the plaintiff, Henry M. Black, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 9th day of March, 1906, upon the decision of the court rendered after a trial without a jury at the New York Trial Term.

Alfred G. Reeves, for the appellant.

Lawrence Godkin, for the respondent.

McLAUGHLIN, J.:

This action was brought to recover upon two duplicate policies of life insurance, of which plaintiff is the assignee. The material

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facts necessary to a disposition of the question presented, and concerning which there is no dispute, are as follows: In 1868 the defendant issued to J. Winslow Jones two policies of insurance upon his life in the sum of \$10,000 each. The beneficiary named in each policy was Addie E. Jones, wife of the insured, and in case of her death, her children. Addie E. Jones died in 1879, leaving her surviving the insured and one son, William Northey Jones. In 1889 the defendant issued, in place of one of the policies, a paid-up policy for \$5,330, payable to the same beneficiaries. Sometime in February, 1898, J. Winslow Jones presented to the insurance company two affidavits, verified by himself, which stated that his safe had been broken into and papers taken therefrom, including the two policies of insurance, and that though he had made diligent effort to recover them, he had been unable to do so, and requested that duplicates be issued. The statement contained in the affidavits, to the effect that the insurance policies were lost, was untrue. They had not been lost, but had always remained in possession of W. Northey Jones, the son of the assured and ultimate beneficiary. The defendant signified its willingness to issue duplicate policies on receiving two bonds of indemnity, signed by J. Winslow Jones and W. Northey Jones, indemnifying it against any and all loss sustained by reason of issuing said duplicates, or by reason of any person claiming under the original policies, and on the 16th of April, 1898, two bonds were presented which purported to be signed by J. Winslow Jones and W. Northey Jones. The signatures, however, of W. Northey Jones were forgeries. The defendant, in good faith, and relying upon the affidavits and the bonds of indemnity, issued the two duplicates, indorsing upon each the following statement:

“NEW YORK, 16th April, 1898.

“The following is as nearly as possible a copy of a policy which appears upon the books of the Company as being still in force..

“A. KLAMROTH,

“Asst. Secretary.”

A few days later, and prior to the 30th of June, 1898, J. Winslow Jones applied to this plaintiff, through one P. W. Hall, for a loan on the policies of insurance, and in the course of the negotiations it was suggested by the plaintiff that the beneficiaries under the poli-

cies be changed so as to have the same payable to the insured, or his executors, administrators or assigns, and for that purpose plaintiff prepared and forwarded to Hall certain documents for execution. On the 30th of June, 1898, the plaintiff, accompanied by J. Winslow Jones and P. W. Hall, presented to the defendant the duplicate policies, together with two documents purporting to be signed by said J. Winslow Jones and W. Northey Jones, which were in the nature of requests that the beneficiaries in the policies be changed to J. Winslow Jones, his executors, administrators or assigns. The requests thus made were not signed by W. Northey Jones, and in so far as his name appeared thereon, the same were forgeries. The defendant, nevertheless, in good faith and relying upon the documents so presented, made the changes as requested and indorsed upon each policy a statement to that effect. On the thirtieth of July following, the plaintiff, on behalf of one J. F. Mackley, loaned to J. Winslow Jones the sum of \$7,000, having previously taken an assignment from J. Winslow Jones of said policies to said Mackley as collateral security for the payment of such loan, which assignment was, a few days later, filed with the defendant. In May, 1899, W. Northey Jones wrote the defendant, asking for the dividends on one of the policies, when he was notified by the defendant that both policies appeared upon its files to have been assigned to one J. F. Mackley. W. Northey Jones immediately notified the defendant of his ownership of the policies and that the documents on file, purporting to be signed by him, were forgeries. In April, 1901, the plaintiff applied, on behalf of J. Winslow Jones, to the defendant for a loan on the policies, to take the place of the Mackley loan, and he was then informed by it of the claim made by W. Northey Jones. On the 10th of July, 1901, Mackley assigned his interest in the policies to this plaintiff, he having, when the loan was made, in consideration of \$500, guaranteed payment of the same. J. Winslow Jones died on the 1st of August, 1901. Proper proofs of his death were duly served upon the defendant by the plaintiff and also by W. Northey Jones, and payment demanded of the policies. In January, 1902, an action was brought by W. Northey Jones against the defendant, in the Superior Court, Hillsboro county, State of New Hampshire, upon the original policies, he claiming as beneficiary thereunder. The action was tried and resulted in a judg-

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ment in favor of the plaintiff for the full amount of the policies. The plaintiff in this action was notified of the commencement of the action in New Hampshire, and also the time and place of trial. Subsequently this action was brought upon the duplicates. At the trial the complaint was dismissed and the plaintiff appeals.

I am of the opinion that the judgment is right and should be affirmed. This plaintiff took his assignment of the policies from Mackley on the 10th of July, 1901, and in the preceding April he had information of the fraud and forgeries committed by J. Winslow Jones. In June, instead of calling the loan and prosecuting J. Winslow Jones, who was then living, he was instrumental in having the loan renewed. J. Winslow Jones, it will be remembered, did not die until August 1, 1901. The plaintiff, therefore, is not in a position to claim that when he took the assignment of the policies in question he was an innocent party or that he took them in good faith. He attempts to meet this suggestion, however, by asserting that he guaranteed the loan to Mackley before he acquired this information, and for that reason he is entitled to stand in Mackley's shoes. But all the frauds and forgeries connected with the policies under which plaintiff claims, or at least that portion which resulted in the change of beneficiaries, were initiated by the plaintiff himself, in order to satisfy or protect his assignor, Mackley. It was this plaintiff who insisted that the change in name of the beneficiary should be made. The written requests to change the names were prepared in the plaintiff's office, upon forms procured by him from the insurance company, and were by him forwarded to Hall for execution, and after the same had been executed and returned to him the plaintiff "examined the requests and remarked that they appeared satisfactory." He then presented them to the insurance company and asked that the change in beneficiaries be made. It was made upon the written requests then presented. It was the plaintiff's neglect or want of care as much, or more than the defendant's, which enabled the fraud to be perpetrated. The plaintiff therefore, is not in a position to insist that the defendant is estopped from questioning the validity of its own act in changing the beneficiaries, inasmuch as he was the one who induced the insurance company to make the change.

But it is said the insurance company was notified by W. Northey Jones, in May, 1899, of the fact of the frauds and forgeries, and it

did not notify the plaintiff until April, 1901. But there was no obligation resting upon defendant to impart this knowledge to plaintiff. Plaintiff was the one who had procured defendant to make the changes, and it had a right, so far as he was concerned, to rely on what he did as being correct. No liability had then matured against the defendant, inasmuch as J. Winslow Jones was still alive, and, therefore, it was under no obligation to impart information to any one concerning the policies.

It is clear that no liability was created against the defendant in favor of J. Winslow Jones, since the issuance of the duplicate policies and the change of beneficiaries were procured by his fraud and forgeries, and the company received no consideration for assuming any new liability, and, upon the facts here presented, I do not see how this plaintiff stands in any better position than J. Winslow Jones would had he brought an action to recover.

Nor do I think, for reasons already suggested, that the plaintiff is in a position to invoke the doctrine of estoppel. When he presented the written requests to change the beneficiaries, he, in effect, represented to the defendant that the signature of W. Northley Jones was genuine. The doctrine of equitable estoppel is based upon equity and justice, and is resorted to to conclude a party by his acts and admissions only when, in good conscience and honest dealing, he ought not to be permitted to deny what he has said or done. (*Wilcox v. Howell*, 44 N. Y. 398; *Marden v. Dorothy*, 160 id. 39; *Lawrence v. American National Bank*, 54 id. 432.)

Finally, it is said that under the rule that where one of two innocent parties must suffer, he must bear the loss whose action enabled the wrong to be done. This rule is invoked upon the theory that the defendant, in issuing the duplicates and changing the beneficiaries, enabled J. Winslow Jones to perpetrate a fraud upon plaintiff's assignor. But this overlooks the fact that it was the act of J. Winslow Jones, plaintiff's original assignor, which enabled the fraud to be perpetrated, and plaintiff, by his connection with the original transaction, is in no better position, so far as enforcing the duplicate policies is concerned, than J. Winslow Jones would be, had he brought an action, for, as we have already seen, he could not enforce the claim.

The defendant has paid the original policies and simply because it was induced by the plaintiff, representing the original assignor,

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to issue duplicates upon the theory that the originals had been lost, and to change the beneficiaries upon forgeries and fraudulent statements, it ought not to be compelled to again pay.

The judgment is right and should be affirmed, with costs.

PATTERSON, P. J., HOUGHTON, SCOTT and LAMBERT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

GANSEVOORT BANK, Respondent, v. EMPIRE STATE SURETY
COMPANY, Appellant.

First Department, February 8, 1907.

Pleading — allegation of performance of conditions precedent under section 533 of the Code of Civil Procedure — complaint against surety.

In alleging the performance of a condition precedent in a contract under section 533 of the Code of Civil Procedure, while it is not necessary to state the facts constituting the performance, yet the plaintiff must allege that he has *duly* performed all the conditions precedent on his part to be performed; a mere allegation of general performance is insufficient. Thus, a plaintiff suing to recover on a bond guaranteeing the payment of a loan who merely alleges that every condition was fulfilled and all things happened and all times elapsed necessary to enable the plaintiff to maintain this action for recovery on the foot of said bond, etc., does not state the performance of conditions precedent under said section.

However, when such complaint alleges that a borrower duly executed and delivered to the plaintiff for value received his promissory note by which he promised to pay the plaintiff \$5,000 at a time stated and that it was to secure the payment of this loan that the bond in question was given, the complaint states a good cause of action and is not defective in failing to show that the plaintiff loaned the money secured by the bond. The allegation that that note was duly executed and delivered for value received, etc., and that the borrower wholly failed to discharge "the said indebtedness of \$5,000" sufficiently alleges that the amount was loaned.

HOUGHTON, J., dissented.

APPEAL by the defendant, the Empire State Surety Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of October, 1906, upon the decision of the

court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the amended complaint.

Benjamin Reass, for the appellant.

William McArthur, for the respondent.

MCLAUGHLIN, J.:

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals from the interlocutory judgment.

One Newman, according to the allegations of the complaint, applied to the plaintiff for a loan of \$5,000, upon his promissory note for that amount, payable four months after date. The plaintiff declined to make the loan without additional security, and thereupon the bond of the defendant was delivered to the plaintiff and the loan made. The note was not paid when due, was duly protested for non-payment, and this action brought upon the bond.

The bond is dated the 24th day of October, 1904, is under seal, and recites that Newman, as principal, and the surety company, as surety, are held and firmly bound to the plaintiff in the sum of \$10,000, payment of which Newman and the surety company bind themselves jointly and severally to make. Then follow these provisions: "WHEREAS the said Randolph M. Newman has applied to the Gansevoort Bank of New York for a loan of Five Thousand Dollars (\$5000) upon his promissory note dated this 24th day of October, 1904, and payable four months after date, And Whereas, the said Gansevoort Bank has declined to make said loan upon said note without additional and collateral security therefor, and for the faithful payment of said loan, And Whereas, the Empire State Surety Company, as an inducement to said Gansevoort Bank of New York to make said loan, executes this certain bond or obligation,

"Now, Therefore, the condition of this bond or obligation is such that if the above bounden Randolph M. Newman shall faithfully discharge and pay the said indebtedness of Five Thousand Dollars (\$5000), then and in that event this obligation to be void and of no effect, otherwise to remain in full force and virtue."

A copy of the bond is annexed to and made a part of the com-

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plaint. The complaint specifically charges: "III:— That on or about the 25th day of October, 1904, at the City of New York, one Randolph M. Newman duly executed and delivered to the plaintiff, for value received, his certain promissory note, in writing, wherein and whereby he did promise to pay to the plaintiff above-named, four months after said date, \$5,000;" and that the note here referred to is the same one mentioned and referred to in the bond. The complaint then charges that the note, at maturity, was presented for payment; was dishonored; that the same was duly protested; that Newman had wholly failed to discharge and pay the said indebtedness of \$5,000, or any part thereof, except \$1,500, and by reason thereof there had been a breach of the condition of the bond prior to the commencement of the action; then follows the 9th paragraph, which contains an allegation that before the commencement of the action "every condition was fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for recovery on foot of said bond of the amount of said note therein mentioned * * * less by the said \$1,500."

The court at Special Term, as appears from the opinion, reached the conclusion that there was no allegation in the complaint that plaintiff loaned \$5,000 to Newman; that that was the condition of the bond and the allegations as to the delivery of the note by Newman and acceptance by plaintiff were not equivalent to an allegation that the plaintiff loaned Newman \$5,000, for which reason the complaint was defective so far as any attempt was made to set out a common-law averment of performance, but that the 9th paragraph of the complaint might be construed as having alleged performance under section 533 of the Code of Civil Procedure.

I am of the opinion that the 9th paragraph of the complaint does not allege performance under the section of the Code referred to. This section of the Code provides that in pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance, but the party may state generally that he, or the person whom he represents, has duly performed all the conditions on his part. When the 9th paragraph of this complaint is carefully considered, I am unable to discover where there is any allegation in it that the plaintiff has *duly per-*

formed all the conditions on its part to be performed ; at most there is an allegation of general performance, and this, I think, insufficient. However, I am of the opinion, under the liberal system of pleading which now prevails, that the complaint states a cause of action irrespective of the 9th paragraph. It shows that Newman duly executed and delivered to the plaintiff, for *value received*, his promissory note, by which he promised to pay to the plaintiff, at a time stated, \$5,000, and that it was to secure the payment of this note that the bond in question was given. Some effect must be given to the words "duly executed and delivered," as well as "for value received." The note was for \$5,000. This is the amount which Newman promised to pay for *value received*.

This necessarily implies, as it seems to me, that that amount was loaned, and certainly so when this allegation is taken in connection with the other allegation that Newman had, prior to the commencement of the action, "wholly failed to discharge and pay the *said indebtedness* of \$5,000."

The judgment appealed from, therefore, should be affirmed, with costs, with leave to the defendant to withdraw the demurrer and interpose an answer on payment of the costs in this court and in the court below.

PATTERSON, P. J., SCOTT and LAMBERT, JJ., concurred ; Houghton, J., dissented.

Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Order filed.

ALFRED P. BOLLER, Respondent, v. THE CITY OF NEW YORK,
Appellant.

First Department, February 8, 1907.

Contract to supervise construction of work for percentage of total cost
— right to percentage on damages paid to contractor for delay.

One who has entered into a contract with a municipality to prepare plans and specifications for a municipal work and to supervise the construction for five per cent of the total cost thereof, and has been paid his full percentage on the contract price of the structure is not entitled to recover an additional percent-

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age upon a recovery had by the contractor against the city for damages caused by a delay in the work whereby the contractor was obliged to pay an advanced price for materials.

Such damages were not part of the cost of the construction within the meaning of the plaintiff's contract for services and were recovered not upon the provisions of the contract but because of a breach thereof.

HOUGHTON, J., and PATTERSON, P. J., dissented, with opinion.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of May, 1906, upon the decision of the court rendered after a trial at the New York Trial Term, the jury having been discharged.

Terence Farley, for the appellant.

L. Laflin Kellogg, for the respondent.

McLAUGHLIN, J. :

On the 1st of July, 1897, the plaintiff entered into a contract with the mayor, aldermen and commonalty of the city of New York, by which he agreed "to furnish plans and working drawings, with specifications therefor, prepare the same for public letting, and supervise the construction and inspect the material for the construction of the viaduct connecting Melrose and Webster Avenues," in consideration of the city paying to him "the sum of five per cent of the total cost of the construction of said viaduct." On the thirtieth of December following the city entered into a contract with the firm of Stevens & O'Rourke, by which said firm agreed to construct the viaduct, but as this contract is not set forth in the record we are unable to examine its terms. It appears, however, that the plaintiff furnished the plans and specifications for the work, prepared the same for letting, supervised the construction and inspected the materials for the viaduct, as required by his contract; that the work required to be performed by Stevens & O'Rourke was completed on the 13th of August, 1901, and accepted by the city, and the contractors paid the sum of \$166,298.09; that on the 18th of October, 1901, the plaintiff rendered a bill to the city for the balance due him under his contract, which was paid and the bill receipted in full; that subsequently Stevens & O'Rourke recovered a judgment against the city, after a trial before a referee, who found that the

city had broken its contract with that firm, in that it had failed to permit the firm to commence the work and prosecute the same, as provided in its contract, and that such delay had caused the firm damage, by reason of the advance in price of granite and iron, to to the amount of \$53,824.06, for which sum, with interest, judgment was directed; that thereafter the judgment was paid and the plaintiff in this action then presented a claim to the city for five per cent of the amount thereof, alleging that this was a part of the cost of the construction of the viaduct within the meaning of his contract; that the claim was rejected and this action brought. At the conclusion of the trial, by consent of parties, the jury was discharged and the case disposed of by the trial judge, who found in favor of the plaintiff for the full amount claimed, and the defendant has appealed.

I am of the opinion the judgment should be reversed. The plaintiff's contract was for five per cent of the total cost of the construction of the viaduct. What did the parties have in mind when they agreed upon this method of fixing the compensation? Obviously the cost of construction as contemplated by the plans, specifications and drawings made by plaintiff, and that this cost of construction was the amount paid the contractors on completion of the work seems to have been the view of the plaintiff himself. He was paid from time to time as the work progressed and his receipt for the final balance, given October eighteenth, stated that it was "in full payment of the above account." The bill then presented and the receipt for payment thereof clearly indicate the plaintiff's understanding as to the meaning of the contract. Stevens & O'Rourke had been paid the full contract price and the plaintiff had received five per cent of the total cost of construction. It is difficult to see how or in what way he could become entitled to any more. The fact that the city broke its contract by neglecting and refusing to permit the contractors to enter upon the work at the time specified in the contract, and for which they were awarded damages, did not, within a fair interpretation of the contract, make those damages a part of the cost of the construction of the viaduct, any more than would a recovery against the city for personal injuries, by reason of the negligence of the contractors while prosecuting the work, be a part of such cost. Had the city refused to let Stevens & O'Rourke commence work on their contract at all,

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and such work had been done by another contractor, no one would seriously contend that damages recovered by that firm for a breach of the contract should be added to the price paid the second contractor to ascertain "the total cost of the construction" on which plaintiff's five per cent should be based, any more than they would contend that the plaintiff would not be entitled to anything if the city had interposed a counterclaim in the action brought by Stevens & O'Rourke for damages for breach of the contract on their part and obtained a recovery equal to the amount agreed to be paid. This plaintiff was entitled to five per cent on the total cost of construction and that he has had. The recovery by Stevens & O'Rourke was for the damages sustained by the wrongful act of the city in breaking its contract. It was not based upon the provisions of the contract, but upon a breach of it, which was not contemplated by either this plaintiff or the city when the contract in suit was made. (*Gearty v. Mayor*, 171 N. Y. 61.) The fact that such damages were measured by the increase in the price of articles entering into the construction of the viaduct makes them none the less damages. The plaintiff was to receive for his work, as we have already seen, five per cent of the cost of construction, and this amount could not be increased by reason of the contractors' recovery for a default on the part of the city which required this plaintiff to perform no additional labor, entailed upon him no extra expense, and did him no damage whatever.

The judgment appealed from, therefore, must be reversed and a new trial ordered, with costs to appellant to abide event.

INGRAHAM and LAMBERT, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., dissented.

HOUGHTON, J. (dissenting):

I dissent. The contract of plaintiff with the defendant was that he was to have five per cent on the total cost of the viaduct. The defendant treated the judgment obtained against it by the contractor as an addition to the cost of the structure. Defendant was authorized by law to issue bonds for the building of the viaduct. It paid the judgment by a sale of such bonds. If the judgment had been for mere damages it would have had no authority to do this, but must have paid it from the general funds of the city. By

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its own interpretation of the transaction and of the contract, therefore, the amount represented by the judgment was an addition to the cost of the work. I think the defendant is bound by this and that the plaintiff is entitled to his percentage on the thus conceded total cost, and that the judgment should be affirmed.

PATTERSON, P. J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CHARLES MURRAY COLMEY, Indicted as CHARLES A. MOORE, alias JAMES MOORE, etc., Appellant.

First Department, February 8, 1907.

Crime — grand larceny, first degree — evidence — false representations as part of *res gestæ* — prior arrest and extradition of defendant.

The defendant was indicted and convicted of grand larceny, first degree, in obtaining money by falsely representing that a certain bond upon which he obtained a loan was a subsisting and outstanding lien. Evidence considered and conviction sustained.

When, in addition to the misrepresentation as to the validity of the bond, the defendant also made false statements as to the existence of a trust company of which he claimed to be attorney and that the person who wished to borrow money on the bond was a wealthy man, when in fact he was a notorious criminal, such minor false representations, connected with the principal misrepresentation, are part of the *res gestæ* and evidence thereof is admissible.

Admission of evidence that the defendant was known by different names in various parts of the world and was under arrest at various times and was under requisition for extradition to another State is not error when shown to excuse the delay in bringing the defendant to trial. Said evidence is also admissible to identify the defendant and also to show flight from the scene of his crime in this State.

When the fact is admitted that the defendant received a check for twenty-five dollars for alleged services as an attorney in the transaction, the contents of the check may be shown without producing the instrument when the defendant is not indicted for receiving money on that check. •

When the defendant under indictment is traveling under many aliases, a witness may state from what source he received his information as to the whereabouts of the defendant, even though the person who gave the information be not produced as a witness.

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APPEAL by the defendant, Charles Murray Colmey, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 26th day of February, 1906, convicting the defendant of the crime of grand larceny in the first degree, and also from an order denying the defendant's motion for a new trial.

Clark L. Jordan, for the appellant.

E. Crosby Kindleberger, Deputy Assistant District Attorney, for the respondent.

HOUGHTON, J. :

The defendant was indicted in January, 1902, charged with the crime of grand larceny in the first degree, in having obtained \$600 from one James A. Smith by falsely representing that a certain bond of the New York and Hempstead Railroad Company, of the face value of \$1,000, was a subsisting and outstanding first mortgage bond against said railroad not yet due, whereas, in fact, it was not outstanding and subsisting, but had been foreclosed and was of no value.

The trial was not had until January, 1906, and it resulting in a conviction as charged, the defendant appeals, alleging that the People failed to establish that any false representations were made by him, or that the bond was worthless, and that many errors prejudicial to him were committed in the course of his trial.

We think the People fully established that the defendant falsely represented that the bond was a valid and subsisting lien of the New York and Hempstead Railroad Company. The evidence shows that the defendant, calling himself Charles A. Moore, in company with a man who styled himself James W. Morgan, represented to the complainant that he was an attorney at law and acting for a corporation known as the International Trust Company, located on Liberty street in the city of New York, which held the bond in question as security for a loan which it had made to Morgan of \$600, and that Morgan, who was about to depart from the city of New York, was fearful that during his absence the trust company would sell the bond, and, therefore, desired that complainant loan that amount of money on it and hold it until Morgan could redeem

it. The defendant had the bond in his possession, and stated to complainant that he had investigated the subject and knew that the bond was valid, and that the coupon for the last interest had only recently been cut off. To these representations the complainant replied that if the defendant was attorney for the company he would take him as his own attorney and rely upon his advice and pay him for it, and loan the money; and the next morning the defendant delivered the bond to complainant and received from him therefor the sum of six hundred dollars, and in addition a check for twenty-five dollars for his services in the matter. The complainant testified that he relied upon these representations, and that he subsequently endeavored to find the International Trust Company but could discover no such corporation; and that he believed that Morgan was a man of wealth as he was represented to be. He subsequently learned, through defendant's admission, that his name was not Morgan but "Jimmy McNally, the old green goods man." The proof was ample too that the bond was worthless. The record on appeal contains a stipulation summarizing the exhibits introduced by the People, with respect to the foreclosure of the railroad mortgage, which shows that on July 19, 1875, in a foreclosure action brought by the Farmers' Loan and Trust Company against the New York and Hempstead Railroad Company, a decree of foreclosure and sale was entered, foreclosing the mortgage given to secure the bond in question with others, and appointing a referee to sell the property covered by the mortgage. The referee reported that on the 23d day of September, 1875, he sold all the lands and premises mentioned in the mortgage and judgment for the sum of \$100. No report of deficiency appears, nor does any order of confirmation of the sale appear to have been entered.

The particular bond in question was not proven before the referee, but two hundred and over of bonds of the same issue were proven on which default had been made in the payment of interest by the company. The defendant insists that the bond in question might be of some value because the mortgage covered rolling and other stock as well as real estate and rights of way, and only the mortgaged lands and premises were sold. It must be assumed that the judgment was regularly obtained, and that the sale was properly conducted and that a sale having been had, all that the railroad com-

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pany owned which was covered by the mortgage was included in the judgment and sold. The bond was, therefore, cut off by the foreclosure and was worthless, and the falsity of defendant's representations in this respect was clearly established.

It is urged as error that the People were permitted to prove the falsity of various other representations, such as the non-existence of the International Trust Company, and the attorneyship of defendant for it, and that the man known as Morgan was not a wealthy man nor a horseman, as the defendant stated, but was a notorious criminal. All these minor false representations were connected with the principal false representation alleged in the indictment, and were made at the same time, and were simply false incidents surrounding the main false representation charged and relied upon. We think they were a part of the *res gestæ* and that evidence concerning them was properly received.

It is also insisted that error was committed in allowing proof that the defendant was arrested or found under arrest, at various times. Some of the occasions under which the witnesses speak of the defendant as under arrest, are mentioned manifestly as excuses for not then apprehending defendant and bringing him to trial on the present indictment. In one instance the defendant was under requisition to the State of Illinois under an indictment found in that State against him under another name than the one under which he was known to complainant; and another occasion relates to the time when he was finally apprehended, he then being in the custody of other officials.

The evidence respecting the different names under which defendant traveled and was known in various parts of the world, and the conditions of arrest and extradition under which he was found, we think was competent not only for the purpose of identification but for the purpose of showing flight from the scene of his alleged crime in this State. If any errors were committed in the development of these facts, they are not sufficiently grave to require a reversal of the conviction.

It is also claimed that evidence of the contents of the twenty-five-dollar check which complainant gave to defendant for his alleged services as attorney was permitted to be given without producing

the check, which was accessible, because it was in the custody of the People. If error was committed in this respect, it was entirely harmless. The defendant was not indicted for receiving the money on that check, or obtaining the money which he did by it. Even if it might have shown on its face that the defendant was acting as attorney for the complainant, and that it was given in payment for his services as such, this fact was not disputed but was admitted by the People. The fact that the defendant was acting as attorney for complainant would not relieve him from the consequences of his false representations and pretenses that he had investigated the validity of the bond and knew that it was an outstanding and subsisting obligation against the railroad company, and that interest had only recently been paid on it.

Nor was any reversible error committed with respect to the evidence of the witness Buchanan that he saw the defendant in Paris in the summer of 1902. It is insisted that the evidence of the witness McConville is based upon a portion of this evidence although it had been stricken out by the court. It was proper for McConville to state from what source he received his information as to the whereabouts of the defendant, even if the person who gave it to him had not been produced as a witness. The defendant was under indictment and was traveling under many aliases, and his apprehension under the present indictment was being sought. How he happened to escape apprehension for so long a time, and the efforts which were made to locate him, were proper facts to be developed upon the question of defendant's flight, which, if established, was some evidence of his guilt.

The defendant is plainly guilty, and we see no reason for disturbing his conviction, and it must be affirmed.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and LAMBERT, JJ., concurred.

Judgment affirmed. Order filed.

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EDWIN EPSTEIN and Others, Composing the Firm of EPSTEIN & VOLLWEILER, Respondents, v. SHEPARD & MORSE LUMBER COMPANY, Appellant.

First Department, February 8, 1907.

Contract — facts raising the question as to whether sale was absolute or conditional.

When in an action for the breach of a contract to sell and deliver lumber the case is tried upon the original oral contract and the defendant gives evidence that in making the order slip, which was shown to the plaintiff at the time, the defendant's agent wrote thereon "if you can't fill order this way, don't ship it," a question of fact arises as to whether the fulfillment of the original contract was conditional upon the defendant's ability to fill the order or was absolute, and it is error to withhold that question from the jury and to direct an assessment of damages.

APPEAL by the defendant, the Shepard & Morse Lumber Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 22d day of May, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of May, 1906, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Williams, for the appellant.

Maurice B. Blumenthal, for the respondents.

HOUGHTON, J.:

The plaintiffs are box manufacturers, and the defendant is engaged in the lumber business, with its principal office in the city of Boston, and maintains a sales department in the city of New York, under the management of one Kennedy, connected with which, as salesman, was one Courtney. The plaintiffs required a special kind of lumber in their business, and gave an order to defendant's salesman for a quantity of inch and inch and a quarter eastern pine, not less than five inches in width and ten feet in length. The order was

given verbally at plaintiffs' place of business, the sales agent making a memorandum of it, which he submitted to the manager of defendant, and upon which a communication in the form of a sales slip was sent from defendant's New York office to plaintiffs, which specified the amount, size and price of the lumber which was to be delivered to plaintiffs, with the additional memorandum that "This must be good average width, nothing shorter than 10 ft. ; * * * no hurry," and with a further memorandum that there probably would be some shorter than ten feet, which, however, would be at a less price, and if not wanted would be taken back. This memorandum also specified that the shipment was to be made "subject to the approval of our Boston office."

The complaint simply alleges that the plaintiffs purchased a quantity of lumber, without specifying the kind or quantity, or whether the agreement was verbal or in writing, at an agreed price, which the defendant failed to deliver within a reasonable time, and asking damages for such breach. The answer is a general denial.

On the trial, after the order had been introduced in evidence, and upon the defendant objecting to the plaintiffs' proving that the agreement was that the lumber should be delivered before the close of canal navigation, the plaintiffs' counsel announced that the contract relied upon by plaintiffs was a verbal one and made with the sales agent at the time the order was given. The defendant's counsel accepted this position, and thereafter the case seems to have been tried without reliance upon the written order and agreement, but on the question as to what the oral agreement in fact was.

Both the witnesses for the plaintiffs and the defendant seem to have been entirely fair in their testimony and the whole controversy appears to have arisen from the fact that some one made a mistake and failed to transmit to the Boston office of defendant an order reading like the one sent to the plaintiffs. The order transmitted to the Boston office was the same as that transmitted to the plaintiffs, except that there was written on it these words: "If you can't fill order this way don't ship it."

The theory of the plaintiffs upon the trial was that this addition not being on the sales slip which defendant forwarded to them, there was a binding agreement on the part of the defendant to fill the order, and it was assumed by the trial court that the oral evi-

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dence upon which plaintiffs announced that they relied for their contract in no way contradicted this. In that respect the learned trial court fell into error, for Courtney, the sales agent, testified that when the order was given at plaintiffs' place of business one of the plaintiffs said to him that the lumber must average a better run of width and length than the cargo they had just bought or they would not accept it, and that he replied "that makes a difference," and then put on his memorandum of the order the following: "Must be better average run of widths and lengths or else don't ship," and handed this memorandum so written to one of the plaintiffs to read over, and that the memorandum embodied the conversation then had on that subject. This testimony was not substantially contradicted, and Vollweiler, with whom it was claimed to have been had, was not produced as a witness.

Aside from the question as to whether or not the order was contingent upon approval by the Boston office, if the agreement to sell was, in fact, conditioned upon the defendant's ability to fill the order in the manner specified, then manifestly it was not an absolute contract and was not an agreement to fill the order at all events. This evidence of Courtney's at least raised an issue as to what the contract really was. If the contract was an unconditional acceptance of plaintiffs' order and an agreement to fulfill, and was not subject to approval by the Boston office, then the defendant would be liable. On the other hand, if the conversation proved only a conditional order and the defendants were not to ship if they could not furnish as specified, then a further acceptance was required on the part of defendant before it could be made to respond in damages for failure to fill the order. The evidence, therefore, presented a question of fact for the jury to determine what the contract actually was, and the court erred in refusing the defendant's request to submit that question to them, and in directing that they only assess plaintiffs' damages, as was done.

It is urged that the letter of defendant of December fifth shows an acceptance of the order and a recognition of its binding effect. Under the circumstances disclosed, that letter may be interpreted, not necessarily as an absolute recognition of the order, but as an indication of an endeavor to fill the order if possible, and a desire to do so if the defendant were able.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., McLAUGHLIN, SCOTT and LAMBERT, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

BROOKS BROTHERS, Respondent, v. LOUIS C. TIFFANY and Others, as Executors, etc., of CHARLES L. TIFFANY, Deceased, Appellants, Impleaded with BURNETT Y. TIFFANY and EDWARD S. HOSMER, as Trustees in Bankruptcy of BURNETT Y. TIFFANY, Defendants.

First Department, February 8, 1907.

Practice — amended answer to amended complaint — acceptance of service ordered.

A verified complaint was served to which the defendants interposed a verified answer and within twenty days thereafter amended the answer. Thereupon the plaintiff served an unverified amended complaint to which the defendants served an unverified answer and within twenty days thereafter served an unverified amended answer which the plaintiff refused to receive. On motion to compel the acceptance of the last amended answer,

Held, that the plaintiff should be required to accept the answer;

That as the plaintiff's amended complaint was unverified a verified answer was not required, for an amended pleading takes the place of the original pleading and the action proceeds as if the original pleading had never been served;

That the defendants by serving an amended answer to the original complaint had not exhausted their right to amend their second answer as of course under section 542 of the Code of Civil Procedure within twenty days because the plaintiff had served an amended complaint.

APPEAL by the defendants, Louis C. Tiffany and others, as executors, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 27th day of November, 1906, denying the said defendants' motion for an order compelling the plaintiff to accept service of their amended answer to the amended complaint herein.

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Arthur F. Gotthold, for the appellants.*L. M. Berkeley*, for the respondent.

HOUGHTON, J.:

A verified complaint was served to which defendants interposed a verified answer, and within twenty days thereafter served an amended answer. Thereupon the plaintiff served an unverified amended complaint to which the defendants served an unverified answer, and within twenty days thereafter served an unverified amended answer, which latter answer was returned by plaintiff on the ground that its service was unauthorized because the defendants had already served one amended answer and so exhausted their privilege of amendment as of course, and on the further ground that it was unverified. A motion was made to compel the plaintiff to accept such service, and from the order denying the same this appeal is taken.

We think service was properly made and that the motion should have been granted. It was not necessary that defendants' answer to plaintiff's unverified amended complaint should be verified. The amended complaint took the place of the original one. Where an amended pleading is served it takes the place of the original pleading, and the action will proceed as if the original pleading had never been served, for the issues thus tendered are the ones upon which the action must proceed. (*New York Wire Co. v. Westinghouse Co.*, 85 Hun, 269; *Lewis v. Pollack*, 85 App. Div. 577.) Section 523 of the Code provides that where a pleading is verified, each subsequent pleading must also be verified. The amended complaint being without verification it was unnecessary that the answers to it should be verified.

Nor do we think that the defendants by serving an amended answer to plaintiff's original complaint had exhausted the right given them by section 542 of the Code to amend as of course their answer to plaintiff's amended complaint within the prescribed time. That section, so far as material, provides that within twenty days after a pleading is served it may be once amended by the party, of course, without costs and without prejudice to the proceedings already had. The plaintiff had a right to serve its amended complaint, which thereupon took the place of the former complaint

and became the complaint in the action, the allegations of which defendants were called upon to controvert or suffer default. (Code Civ. Proc. § 543.) Within the proper time they did answer it, and within twenty days from the service of such answer they had a right, we think, to serve an amended answer, as of course, which in turn took its place as the answer to plaintiff's amended complaint. It not requiring verification, and having been served in time, its return was authorized, and the court should have compelled its acceptance.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN, and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted. Order filed.

HARRY LEVIN, Respondent, v. FRANK M. HILL and WILLIAM R. ROSE, Appellants, Impleaded with MAX MONFRIED, Defendant.

First Department, February 8, 1907.

Vendor and purchaser — express covenant that lands are free from certain restrictions — vendee not charged with notice of recorded deed contradicting such covenant.

When a vendor covenants to convey real estate free of all incumbrances "except existing covenants as to nuisances, if any, which do not, however, prevent the erection of stores or tenement houses," and it is shown that the premises are subject to a restrictive covenant prohibiting the erection of any building less than two stories in height or any building without a cellar or any building costing less than \$2,500, the title is not free of incumbrances and the vendee is entitled to recover the earnest money.

In such case a vendee is not chargeable with notice of such covenant, although it is of record, if the contract of sale does not specify any particular deed but speaks generally of covenants against nuisances.

Contra, if the contract provide that the premises are to be taken subject to a covenant against nuisances in a specified deed. In such case the purchaser is charged with notice thereof.

APPEAL by the defendants, Frank M. Hill and another, from a judgment of the Supreme Court in favor of the plaintiff, entered

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in the office of the clerk of the county of New York on the 7th day of May, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

Hillquit & Hillquit, for the appellant Hill.

Gibson Putzel, for the appellant Rose.

Michael Schaap, for the respondent.

HOUGHTON, J.:

The appellant Rose contracted to sell certain real estate to appellant Hill, who assigned the contract to defendant Monfried, who in turn assigned it to respondent, who brings this action to recover back the moneys paid, on the ground that the premises are subject to a restrictive covenant not provided for in the contract.

The contract of sale stipulated that the premises should be free from all incumbrances "except existing covenants as to nuisances, if any, which do not, however, prevent the erection of stores or tenement houses." In the deed to Rose, which was recorded on the 7th day of May, 1900, four years and more before the contract in controversy was made, there was a covenant running until January 1, 1910, against nuisances, in the ordinary form, to which, however, was added the further covenant that neither the grantee nor his grantees should "erect or permit to be erected upon any portion of said premises any building less than two stories in height, or any building without a cellar; * * * that neither he nor they will erect or permit to be erected upon any part of said premises within sixty feet of West Farms Road, on which said lots front, any building costing less than Twenty-five hundred dollars."

Title was rejected on the ground that the contract did not provide that the premises should be taken subject to the covenant above quoted, because it could not be classed as a covenant against nuisances; and that even if the whole covenant could be read as one against nuisances, still it was contrary to the agreement because it prevented the erection of a store or tenement of one story in height, and prescribed that the cost should not be less than \$2,500, and that there should be a cellar underneath the building.

It seems plain that the covenant is more than one against nuisances only. But even if the covenant be construed as an entire

one against nuisances, it did prevent the erection of stores and tenements, because it prevented the erection of a store or tenement one story in height, and it prevented the erection of a building without a cellar, and it restricted the cost to not less than \$2 500. The contract provided that the premises should be free and clear except as to existing covenants as to nuisances, if any there might be, which did not, however, prevent the erection of stores or tenements.

The owner contracted to give a clear title except as specified. The title which he tendered was not clear, but was burdened with a covenant which prevented the free use of the property for stores or tenements. This was contrary to the agreement, and the respondent was justified in rejecting the title, unless the fact of the deed containing the objectionable covenant being on record precludes him from so doing. I do not think it does. The contract of sale does not specify a covenant in any particular deed. It speaks generally of covenants against nuisances if any there are. The owner took the responsibility of contracting absolutely for a clear title, except that if there were any covenants against nuisances, they should not operate against the building of stores or tenements. If the contract had provided that the premises were to be taken subject to a covenant against nuisances in a specified deed, then the purchaser at his peril must have examined the deed. Such was the situation in *Feltenstein v. Ernst* (49 Misc. Rep. 262; *affd.*, 113 App. Div. 903) and in *Blanck v. Sadlier* (153 N. Y. 551). In each of those cases the premises were to be taken subject to a specified mortgage, and it was held that the mortgages being recorded it was incumbent upon the vendee, in the absence of fraud or deceit, to acquaint himself with the particular terms of the specified incumbrance. In the present case no particular covenant in any specified deed is mentioned, but it is simply provided in general terms that if there be any covenant, it shall be of a specified kind. The owner knew what the covenant was and carelessly contracted as to its terms. The vendee had no actual knowledge, and it does not seem to me that he had constructive notice or that he was put upon his inquiry.

I think the judgment was right and should be affirmed.

McLAUGHLIN, SCOTT and LAMBERT, JJ., concurred.

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PATTERSON, P. J. (concurring):

I concur on the ground that the covenant is more than one against nuisances, and therefore, the purchaser should not be compelled to take.

Judgment affirmed, with costs. Order filed.

HARRY MEYERSON, an Infant, by DAVIS MEYERSON, His Guardian
ad Litem, Respondent, v. SAMUEL LEVY, Appellant.

First Department, February 8, 1907.

Practice—preference of infant—waiver of preference by default on motion therefor.

According to the provision of section 793 of the Code of Civil Procedure a motion to place a cause upon the preferred calendar in the county of New York must be made at the commencement of the term for which notice of trial is served.

If a party entitled to such preference and having served notice of trial and notice of motion for a preference upon the ground that the plaintiff is an infant make default on the return day, the right to a preference is lost.

Such default is not excused because the party had failed to file a note of issue for the term for which he had noticed the trial, for in any event he should have appeared and withdrawn the motion rather than let it be dismissed.

When the right to a preference has been once waived as aforesaid a subsequent notice of trial for another term is futile either to avoid the effect of the waiver or to support a new application.

In the county of New York, where a large number of causes are upon the calendar, the practice with respect to preferences must be strictly followed.

APPEAL by the defendant, Samuel Levy, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 12th day of December, 1906, granting the plaintiff's motion for a preference.

Louis Cohn, for the appellant.

Myron S. Fochelson, for the respondent.

HOUGHTON, J.:

The sole plaintiff being an infant he would have been entitled, under the provisions of subdivision 5 of section 791 of the Code of

Civil Procedure, to a preference on the calendar had he pursued the proper practice.

On the 8th day of October, 1906, the plaintiff's attorney served a notice of trial for the November term following, together with a notice of motion for a preference, returnable on the first Monday of that term. The defendant also noticed the cause for trial for the same term. The plaintiff did not appear upon the return of his motion and it was dismissed on defendant's motion for default.

According to the provisions of section 793 of the Code of Civil Procedure applicable to the county of New York, a motion to place a cause upon the preferred calendar must be made at the commencement of the term for which the notice of trial is served.

The excuse which plaintiff gives for not appearing on his motion is that he discovered that his office had failed to file a note of issue for the November term, and, therefore, he abandoned his motion. The record does not disclose whether or not the defendant filed a note of issue; but he did appear in opposition to the motion for preference and took its dismissal.

Presumably the cause was on the calendar and presumptively the court properly dismissed the motion for failure of plaintiff to appear. If the plaintiff desired to save his rights he should have appeared and withdrawn his motion rather than let it be dismissed. (*Bazuro v. Johnson*, 71 App. Div. 255.) Concededly the cause was noticed by both parties for the November term, and the motion for preference having been passed upon by dismissal, the plaintiff had exhausted his right to move at the December term as he did. A failure to make a motion for preference at the commencement of the term for which notice of trial is served operates as a waiver of the statutory right of preference, and a subsequent notice of trial for another term is futile either to avoid the effect of the waiver or to support a new application to obtain such preference as a matter of right. (*Marks v. Murphy*, 27 App. Div. 160.) A renewal of the motion at the December term, although a notice of trial was served, was, therefore, ineffectual.

In view of the large number of causes upon the calendar, in which the law gives no preference, the question as to whether a cause shall be preferred or not is one of importance to litigants, and the practice with respect to preference should be strictly followed.

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In our view the plaintiff had lost his right to put his cause on the preferred calendar, and the order granting his motion to that effect was improper.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, without costs.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, without costs. Order filed.

In the Matter of the Arbitration Between LUKE A. BURKE, Respondent, and HENRY CORN, Appellant, under an Agreement to Arbitrate, Dated April 3, 1905.

First Department, February 8, 1907.

Arbitration — when submission to arbitration warrants judgment for interest — right to interest matter of law — when decision of arbitrator final on appeal.

When the owner of lands and a contractor who has erected a building thereon submit controversies as to amounts due under the contract and for extra work to arbitration pursuant to chapter 17, title 8 of the Code of Civil Procedure, and submit all manner of actions, causes of actions, suits, controversies, claims and demands whatsoever now pending and existing between them, the arbitrator has jurisdiction to determine whether the contractor is entitled to interest on the sum found due, for that issue is clearly within the terms of the submission.

An express submission of the issue as to the right to interest is not necessary in order to permit a recovery thereof, for as a matter of law a right to interest follows a claim for a demand capable of computation.

It is only where the amount due is incapable of being ascertained by computation that an allowance of interest is improper.

The presumption is that the award was correct and, in the absence of the evidence, that facts were disclosed that warranted the allowance of interest on the sum found to be due.

On appeal from the decision of an arbitrator the Appellate Division cannot review the merits of the decision when there is nothing on the face of the award showing that the arbitrator decided wrongly.

The court is limited in its review by sections 2373, 2374 and 2375 of the Code of Civil Procedure, and is confined to the grounds specified in those sections.

APPEAL by Henry Corn from a judgment of the Supreme Court in favor of Luke A. Burke, entered in the office of the clerk of the county of New York on the 9th day of October, 1906, upon an award made by an arbitrator.

George Hahn, for the appellant.

Eidlitz & Hulse, for the respondent.

HOUGHTON, J.:

The appellant Corn was the owner and the respondent Burke the contractor for the erection of a building. Controversies having arisen as to the amount due the contractor under his contract and for extra work, and as to the amount which should be deducted therefrom in favor of the owner, the parties entered into a written agreement to arbitrate their differences before a single arbitrator agreed upon with the further stipulation that his decision should be final and that judgment might be entered thereon. The particular form of submission reads as follows: "That the parties hereto do hereby pursuant to Chapter 17, Title 8 of the Code of Civil Procedure submit all and all manner of actions, cause and causes of actions, suits, controversies, claims and demands whatsoever now pending and existing by and between them," respecting the amount due from the owner to the contractor under the contract and for extra work, and the amount due from the contractor to the owner respecting various claims made by him arising out of such contract or in connection with alterations on the building or to such contract.

After hearing the evidence adduced by the parties and the proofs submitted by them, the arbitrator made an award as follows: "That there is due to Luke A. Burke from Henry Corn on account of the matters and things set forth in the said agreement of arbitration, after making deductions and allowances in favor of said Henry Corn from the amount claimed by said Luke A. Burke, the sum of Forty-five thousand three hundred eighty-seven and 18/100 dollars (\$45,387.18), with interest thereon from June 1, 1904, being the sum of Five thousand nine hundred and 33/100 dollars (\$5,900.33), amounting in the aggregate to the sum of Fifty-one thousand two hundred eighty seven and 51/100 dollars (\$51,287.51)."

The appellant paid the principal sum awarded but refused to pay

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the amount allowed as interest, and moved that the award be modified by striking the same therefrom, which motion was denied and the award confirmed and judgment directed to be entered for the unpaid balance, and from such disposition of the matter this appeal is taken.

The appellant insists, *first*, that the matter of interest was not within the submission of arbitration, and, *second*, that the nature of the claims between the two parties was such that as matter of law interest could not be allowed.

The question whether either party should have interest on any sum which might be due him from the other was clearly within the terms of the submission of arbitration. All manner of claims and demands were submitted. It is not necessary there should be any agreement for interest in order to permit a party to recover it. Whenever a debtor is in default for not paying money, in pursuance of his contract, he is chargeable with interest from the time of default, on the specified amount of money which should have been paid. (*Van Rensselaer v. Jewett*, 2 N. Y. 135; *White v. Miller*, 78 id. 393; *Sweeny v. City of New York*, 173 id. 414.) Interest follows the claim by way of damages for failure to pay when the party is obligated so to do.

It was not necessary in the agreement of arbitration, therefore, to specify whether or not interest should be allowed, for interest followed as matter of law the determination that a certain sum known to the party obligated was due and payable to the other on a particular day. The question as to whether or not interest should have been allowed under any given state of facts was properly before the arbitrator and within the submission to arbitrate.

Whether or not, as matter of law, any interest should have been allowed the respondent on his claim, this court cannot now decide. There is nothing on the face of the award showing that the arbitrator decided wrongly in this respect, and his determination, therefore, is final in that regard.

The Code of Civil Procedure contains specific directions with respect to the confirmation and correction or modification of an award. By section 2373 it is provided that the court *must* grant an order of confirmation "unless the award is vacated, modified or corrected as prescribed in the next two sections." The grounds upon

which an award may be vacated are not involved on this appeal and it is unnecessary to refer to them. The three grounds specified by section 2375 upon which an award may be modified or corrected are as follows: "1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award. 2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted. 3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and, if it had been a referee's report, the defect could have been amended or disregarded by the court;" in which cases the court may modify and correct the award so as to effect the intent thereof and promote justice between the parties.

It is manifest that the complaint with respect to the award involved on this appeal does not fall within any of the subdivisions above quoted, if it be assumed, as has been, that the question of interest was embraced within the submission of the award to the arbitrator.

Matter of Wilkins (169 N. Y. 494) contains the latest discussion by the Court of Appeals of the question of the conclusiveness of awards. In the course of the opinion, MARTIN, J., says: "Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts, is final and conclusive, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be, the parties must abide by it." The opinion proceeds further to discuss the provisions of the Code of Civil Procedure permitting the setting aside, correcting or modifying of an award, and concludes that courts have no powers of review other than those specified by the various sections of the Code.

The cases of *Dodds v. Hakes* (114 N. Y. 260) and *Cullen v.*

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Shipway (78 App. Div. 130) do not hold the contrary. In each of those cases actions were brought to set aside an award made upon a parol arbitration, and both turned upon the proposition that the arbitrators exceeded their jurisdiction and passed upon matters not submitted to them. Here the question of interest was within the scope of the submission, and even if the arbitrator erroneously allowed it the appellant is without remedy.

But upon the merits it is by no means clear that the arbitrator erred in allowing interest. The evidence adduced before him is not before the court on this appeal. It is only where the amounts due are incapable of being ascertained by computation that the allowance of interest is improper. (*Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11.) In an action upon a contract for work done and materials furnished, which provided that the contractors were to be allowed a specific price for each item of labor or materials furnished, they are entitled upon recovery to interest upon their claim from the time of demand for its payment. (*Sweeny v. City of New York*, *supra*.) The arbitrator allowed interest only from a time subsequent to the furnishing of all material and the performing of all work, and after respondent demanded that he be paid. It is possible that if we had the evidence before us which was adduced before him we might say that the amounts due from the appellant to respondent were incapable of being ascertained by computation, and, therefore, that interest could not be allowed. On the other hand, it is entirely possible that such evidence would disclose that certain sums were due the respondent, and that the parties agreed upon deductions and the price to be paid for extra work, so that whatever remained due the respondent was entirely a matter of computation, and hence that interest would follow. The question is not whether the respondent was in fact entitled to interest, but rather whether facts might have been disclosed which showed that he was entitled to it. The presumption, even if the award be not conclusive, is in favor of its correctness, and certainly in the absence of the evidence it must be presumed that facts were disclosed which did entitle the respondent to interest on the amount which the arbitrator found due him and which he had demanded should be paid.

Not only, therefore, should the judgment be affirmed because the award is conclusive upon the parties, but also because a state of facts might have been proven and presumptively were proven which would entitle the respondent to interest as matter of law.

PATTERSON, P. J., and McLAUGHLIN, J., concurred ; SCOTT and LAMBERT, JJ., dissented.

SCOTT, J. (dissenting):

It clearly appears from the papers used on the motion below that the controversy between the parties arose out of a building contract under which the respondent claimed the unpaid balance of the contract price, as well as a sum for "overtime" work, while the appellant claimed that the respondent failed to perform the contract according to its terms, whereby he asserted a right of counterclaim or set off against any amount found to be due to respondent.

It is apparent, and not questioned, that the amount due to respondent under these circumstances was unliquidated, and it is now settled that the respondent was not entitled to recover interest on the balance that might be found due him, after the deduction of the damages for defective work or inferior materials. (*Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11.) It must be conceded, therefore, that the arbitrator erred in awarding interest on the net amount which he found to be due to the respondent. It is the unquestioned and well-settled law of this State that the awards of arbitrators are, if possible, to be upheld, and that all reasonable intendments and presumptions are to be indulged in their support, and they will not generally be overruled for errors of law or fact on the part of the arbitrator. But this rule is subject to the qualification that an award may be corrected, or, if necessary, set aside for palpable errors of fact, such as a miscalculation of figures, or for any error of law where the error is patent upon the face of the award, and it appears that the arbitrator intended to decide according to the law, but did not, the reason being that in making such correction the court merely carries into effect the intention of the arbitrator. And it is not necessary that it should appear by express statement in the award that the arbitrator intended to decide according to law, in order to give the court power to review. It is sufficient if this be shown by clear and necessary inference. (*Fudickar*

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v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. 392.) In the present case the arbitrator has struck a balance between the parties, and has found the sum due from appellant to respondent, and has then added interest to that sum. It is clear that he awarded this interest because he believed that the respondent was entitled to it as matter of law, and his own affidavit is to that effect.

I think that it is within the power of the court to correct the award. Section 2375 of the Code of Civil Procedure gives very wide power in that respect. It authorizes the court to modify or correct the award as follows: "Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted." The submission signed by the parties committed to the decision of the arbitrator "All and all manner of actions, cause and causes of actions, suits, controversies, claims and demands whatsoever, now pending and existing by and between them *as aforesaid*."

The preamble states the nature of the controversies. It recites the execution of the building contract; that controversies had arisen between the parties as to what amount, if any, was due to respondent from appellant on account of the work performed and materials furnished, whether under contract or otherwise, and also what amount, if any, was due to respondent from appellant with regard to the various claims made on behalf of the respondent against the appellant arising out of said contract, or in connection with the alterations on said building; and also as to what amount, if any, was due to the appellant from the respondent with regard to the various claims made on behalf of the appellant against the respondent arising out of said contract, or in connection with said alterations.

It will be seen from a careful reading of the submission that nothing was committed to the determination of the arbitrator except the *amounts* then due from each to the other of the parties to the submission. Nothing whatever is said about interest, and it seems to be quite clear that whether or not interest should be allowed upon the balance found due from either to the other was left as a matter to be determined by the law, and was not included in the submission as a matter to be arbitrated. It seems to me to be equally clear that the arbitrator, having found the balance, intended

to include the interest in his award only because he believed that the law awarded it under the circumstances. By striking the interest out, the arbitrator's award upon the matters strictly submitted to him will not be disturbed, and the question of interest will be disposed of according to law, as it was his evident intention that it should be. In this way the true intention of the arbitrator will be carried into effect.

Fortunately the arbitrator has so framed his award, stating separately the balance found due and the interest, that no difficulty will be experienced in making the proper correction.

The judgment appealed from should, therefore, be modified by striking therefrom the award of \$5,900.33 interest, and as modified affirmed, with costs to appellant.

LAMBERT, J., concurred.

Judgment affirmed, with costs. Order filed.

JOHN TOWNSHEND, Respondent, v. JOSEPH P. KEENAN, Appellant,
Impleaded with Others. (No. 1.)

First Department, February 8, 1907.

Ejectment — new trial on payment of costs — right where payment compelled by execution.

Under section 1525 of the Code of Civil Procedure whereby the defendant in an action of ejectment is entitled to a new trial as a matter of right upon payment of costs within three years after entry of judgment against him, it is immaterial whether the costs be paid by the defendant voluntarily or collected from him by execution on the judgment. That section does not refer to a voluntary payment of costs only. Actual payment within the time specified is all that is necessary.

The situation is not affected by reason of the fact that the execution was satisfied by a sale of the interest of the defendant in the premises.

APPEAL by the defendant, Joseph P. Keenan, from an order of the Supreme Court, entered in the office of the clerk of the county of New York on the 9th day of November, 1906, denying a motion to restore the action to the calendar.

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Benjamin Patterson, for the appellant.*Jacob Fromme*, for the respondent.

HOUGHTON, J.:

The action is in ejectment, and its trial resulted in a judgment for plaintiff, which was entered February 18, 1895, with \$128 costs. Prior to the expiration of three years from the entry of this judgment, within which time, by the provisions of section 1525 of the Code of Civil Procedure, the defendant was entitled to a new trial as of right, upon payment of costs, the plaintiff collected the costs by execution issued against the defendant. Within the three years, and after the costs had been thus collected and paid, the defendant made and submitted a motion for a new trial, which, however, did not result in the entry of an order until March 14, 1898, several days after the three years had expired. This order provided that the defendant should have thirty days within which to pay such costs. On appeal to this court this provision with respect to the payment of costs was stricken out, and the order otherwise affirmed, the court holding that the order related back to the time of the submission of the motion. (34 App. Div. 629.) This order, as thus modified and affirmed, is still in force, and the situation, therefore, is that the costs were paid and an order granting a new trial made within three years from the entry of the judgment on the first trial.

The plaintiff urges that an involuntary payment of costs by execution, in an ejectment action, is not the payment contemplated by section 1525 of the Code, and that, therefore, the defendant has failed to comply with the provisions of the section respecting the payment of costs.

We think otherwise. Actual payment of the costs within the time specified is all that is necessary. If the plaintiff in an ejectment action sees fit to issue an execution upon the judgment for costs which he has obtained on the trial of his suit, and collect them in that manner, it is as good a payment as though the defendant had voluntarily made it. If he does this within the three years, the defendant is entitled to the benefit of such payment on his motion for a new trial made within that period. Nor does it affect the situation, as was done in the present case, that the execution was satisfied by a sale of whatever interest the defendant had in

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the premises from which he was ejected. If the plaintiff saw fit to bid an amount sufficient to satisfy the judgment for costs on such sale, it was nevertheless money realized upon the execution, and is necessarily applied to the satisfaction of the judgment. The requirement of the statute is that the costs shall be paid, and such requirement is satisfied whether the payment be voluntary or involuntary.

The costs having been paid within the three years and an order for a new trial having been made in contemplation of law, within that time, the action is still pending, and the defendant is entitled to a retrial; and the court should have granted the motion restoring the cause to the calendar.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted.

PATTERSON, P. J., INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted. Order filed.

SHEPARD N. EDMONDS, Appellant, v. THE ATTUCKS MUSIC PUBLISHING COMPANY, Respondent.

First Department, February 8, 1907.

Practice—inspection of books and papers before trial—relief from stipulation.

When in an action for services the defendant counterclaims fifty odd items of moneys misappropriated by the plaintiff at specific dates, which items are particularly set forth in the answer, the plaintiff should be allowed an inspection of the defendant's books in order that uncontested issues may be eliminated from the trial.

Under such circumstances an inspection is as much for the benefit of the trial court as for the party himself.

APPEAL by the plaintiff, Shepard N. Edmonds, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 19th day of November, 1906, granting the defendant's motion to be relieved from a stipulation consenting to the inspection of certain

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of defendant's books and papers and denying the plaintiff's motion for an inspection thereof.

Charles Goldzier, for the appellant.

Benno Loewy, for the respondent.

HOUGHTON, J.:

Counsel formerly representing the defendant had stipulated orally with counsel for plaintiff that certain books and papers of the defendant might be examined without an order, or that in case of necessity an order so to do might be entered, which latter course was pursued. Meantime, however, defendant had changed attorneys and moved to be relieved from this stipulation and order, to which motion plaintiff replied by asking that the order stand or that a new order for inspection be made. The court set aside the former stipulation and order and denied plaintiff's motion for inspection.

The action is for services rendered by the plaintiff to defendant as its general manager in the music publishing business. The answer, in addition to the denials, sets up a counterclaim of fifty odd items of money, specific dates and amount of which are given, which, it is alleged, the plaintiff misappropriated, aggregating in all the sum of \$2,745.81. The particularity with which these items are set forth indicates that presumably they must appear upon defendant's books of account, and such is claimed to be the fact.

The consent of defendant's former counsel that plaintiff might examine defendant's books would seem to have been entirely proper. Such inspection would necessarily facilitate the trial by determining what could be admitted and what would be controverted. There are a large number of items and an inspection under such circumstances is as much for the benefit of the trial court as for the party himself, for it tends to eliminate uncontested issues. The fact that there have been two mistrials without inspection is not a reason for now withholding it. On the contrary, it may tend toward the bringing about of a trial which will finally settle the controversy.

It is possible that the consent of counsel for defendant to an order for inspection, he not being the attorney of record, was not

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ling, and that for that reason the order entered *after he had* ed to be counsel should have been set aside. The court, how-
r, should have granted the plaintiff's motion for inspection of
defendant's books mentioned in and according to the form of the
er which was set aside.

The order appealed from should be reversed, with ten dollars
s and disbursements, and plaintiff's motion for inspection granted
ndicated.

ATTERSON, P. J., INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ.,
curred.

Order reversed, with ten dollars costs and disbursements, and
ion granted as indicated in opinion. Settle order on notice.

WIN EISERT, Respondent, v. ABNER T. BOWEN and Others, Appel-
ants, Impleaded with WILLIAM H. McWHIRTER and DIME SAV-
INGS BANK OF BROOKLYN, Defendants.

First Department, February 8, 1907.

tor and creditor — agreement of creditors to prosecute claims for
mutual benefit — when purchaser of debtor's property holds as trustee
r other creditors — when release in former action does not bar
editor from sharing in trust property — reimbursement of trustee.

ral creditors entered into a mutual agreement to act together in the enforce-
ment of their respective claims and that the amount realized should be shared
pro rata. It was agreed that certain sums should be advanced by parties *pro*
rata to protect the debtor's property from foreclosure on mortgages prior to
eir liens, and that upon foreclosure the property should be bought in and
ld for the benefit of all creditors, none of them, however, being under
obligation to advance any money.

l, that one of the parties to said agreement who purchased the property on
reclosure held it impressed with a trust for the benefit of his fellow-creditors,
though under the agreement he was under no obligation to buy the property;
t the interlocutory judgment in a former action by one of the creditors
gainst the trustee to impress a trust upon the property bought on foreclosure
as not *res adjudicata* as to the right of a creditor who did not appear in that
tion, when the relief awarded him in the final judgment was reversed on the
round that there was nothing to support it; that a receipt and release exe-
cuted by such creditor in the former action relieving the other parties from all

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claims referred only to the claims and liabilities that might have arisen out of the transactions recited in said instrument and had no reference to the creditor's interest in the real estate impressed with the trust;

That as the purchaser on foreclosure was held to have purchased as trustee for his fellow-creditors, he was entitled to be reimbursed for the money actually paid for the property and not merely for so much thereof as went to satisfy the mortgage.

APPEAL by the defendants, Abner T. Bowen and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of April, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

Henry B. Johnson, for the appellants.

James M. Fisk, for the respondents.

SCOTT, J.:

In the year 1898 one Frank W. Gilbert was the owner of four apartment houses in the city of New York, which he had just erected. On October 18, 1898, he mortgaged the houses to the German Savings Bank for \$165,000, and also placed a second mortgage upon them for \$15,000. The latter mortgage was executed to one Redfield, who assigned it to one Sondheim, and it will hereafter be spoken of as the Sondheim mortgage. It was agreed to be paid off in installments, commencing December, 1898. The property mortgaged was then worth about \$245,000. When these mortgages were executed Gilbert was indebted as follows: To the plaintiff herein, \$21,150; to William H. McWhirter, \$9,656; to Abner T. Bowen, \$26,500; to Mary E. Busey, \$27,000, and to William H. Busey, \$895.84, aggregating \$85,201.84. No part of the claims of Abner T. Bowen, Mary E. Busey or William H. Busey were secured. Part of plaintiff's claim, to wit, \$3,500 thereof, was represented by an unrecorded mortgage. McWhirter's claim was for materials furnished and work done and he was entitled to a mechanic's lien. Gilbert, as it is said, promised to pay the claims against him when he should have placed the permanent loan upon the property. Instead of doing so, and on October nineteenth, the day after he had made the permanent mortgage to the savings bank, he executed and recorded a mortgage in favor of his mother-

in-law, Mary Hopkins, for \$18,000, and on the following day, October twentieth, he executed and recorded another mortgage to Mrs. Hopkins for \$65,000. All the parties agree that as to the creditors above mentioned these mortgages were void, and Mrs. Hopkins herself seems to have so considered them, for she afterwards turned them over to the creditors or to trustees for their benefit. As soon as these last-mentioned mortgages had been recorded the plaintiff, Eisert, placed his \$3,500 mortgage on record, McWhirter filed a mechanic's lien and all the creditors began such actions as they were advised to do in order to collect their claims. The above-named creditors had numerous conferences which resulted in an agreement between them dated December 3, 1898, whereby they agreed to act together in the enforcement of their respective claims; that all amounts realized should be shared *pro rata* between them in proportion to their respective claims, except that moneys received on account of claims against Mrs. Hopkins should be *pro rata* only between Bowen, the Buseys, and Eisert; that certain sums should be advanced by the parties *pro rata* to protect the property from foreclosure or mortgages prior to the liens of the above-named creditors; that upon foreclosure and sale of the property it should be bought in and sold for the benefit of all of said creditors, no obligations being implied thereby for the payment of any sum of money by any party. Various proceedings were thereafter had which it is unnecessary to recapitulate here, and on February 8, 1899, a further agreement was made between the parties reciting that Mrs. Hopkins had caused the \$18,000 mortgage to be assigned in trust for the creditors other than McWhirter (he assenting), and that the proceeds thereof should be pro-rated between such creditors (other than McWhirter); McWhirter thereupon discharged his mechanic's lien, and discontinued an action he had brought to have the mortgages declared void. At the same time Abner T. Bowen, as trustee for himself and for the other creditors, and with Gilbert's consent, took possession of the premises, collecting the rents, and paying the necessary expenses. The \$18,000 mortgage was assigned to Busey, as trustee for the creditors, and on February 9, 1899, a further agreement was entered into fixing the proportions in which the proceeds of the \$18,000 mortgage assigned to Busey should be divided when realized, and it was again agreed that upon any foreclosure sale the prop-

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erty should be bought in, held, managed and sold for the benefit of all the creditors. It was finally agreed that the property should be sold under the so-called Sondheim mortgage for \$15,000, and it was so sold on May 4, 1899. At this sale the property, subject to the first mortgage of \$165,000, was purchased for \$30,000, nominally by one Samuel T. Busey, the brother-in-law of Abner T. Bowen, and the deed therefor was in due time executed to said Samuel T. Busey. Part of the relief asked for and awarded to plaintiff is that it be declared that the purchase was actually made by Abner T. Bowen, and that he be adjudged to have so purchased it as trustee for plaintiff and the other creditors of said Gilbert.

This precise question, upon practically the same evidence, was decided by this court in a similar action brought by the defendant McWhirter (*McWhirter v. Bowen*, 103 App. Div. 447), and the judgment that Bowen was the real purchaser has recently been affirmed by the Court of Appeals. (187 N. Y. 516.) It is unnecessary, therefore, to consider that question further. If Bowen in fact was the purchaser, as he undoubtedly was, the agreements into which he entered with plaintiff and the other creditors impress a trust upon the property in his hands in favor of his co-creditors. It is true, as he now urges, that he had not assumed any obligation to buy the property inasmuch as it involved the payment of a sum of money, but having in fact bought he cannot escape the obligation to hold it as trustee for the creditors. The suggestion that the plaintiff is in some way barred by the judgment in McWhirter's action does not merit extended consideration. It is true that it was held that under the interlocutory judgment Eisert might come in and prove his claim and participate in the benefits of the first judgment. (82 App. Div. 144.) He did not take advantage of the opportunity, and the relief extended to him by the final judgment was reversed as to him, because, as to him, there was nothing to support the judgment. (103 App. Div. 447.)

He had not appeared in the action, had not participated in it, and was not bound to do so. The final judgment as modified by this court was not an adjudication upon his rights in any sense. It is strenuously urged that plaintiff has released all claims against the defendants. He did sign a receipt which contained words of release, but it did not apply to or affect his present claim to an

interest in the property. A surplus of some \$9,500 resulted from the sale under the Sondheim mortgage, and this, of course, went towards the satisfaction of the \$18,000 mortgage, which was the next lien, and was held by William H. Busey, as trustee for the creditors other than McWhirter. Bowen as trustee for the creditors had collected rents and paid expenses, and he and Busey acted together, representing the same interests. An account was made up of all the receipts and disbursements, including the surplus derived from the foreclosure sale and the net balance was distributed, Eisert receiving \$1,000. He executed the paper set up as a release. This paper recited the previous agreements between the creditors, and, in detail, the agreement as to the proportions in which the proceeds of the \$18,000 mortgage was to be distributed; that the expenses of maintaining the houses had exceeded the rents collected; that a foreclosure sale had taken place from which a surplus had arisen to be applied on the \$18,000 mortgage. Thereupon, in consideration of the receipt of \$1,000, Eisert released and forever discharged Bowen, Mary E. Busey and William H. Busey from all obligations, liabilities and claims, either in law or equity, due or owing to him, said payment being declared to be in full settlement and discharge of all obligations of said parties and each of them to him. It is entirely clear that this paper had reference only to such claims or liabilities as might have arisen out of the transactions recited therein and had no reference whatever to the claim to an interest in the real estate itself, which is the subject of the present action. (*Jackson v. Stackhouse*, 1 Cow. 122; *National Mechanics' Banking Assn. v. Conkling*, 90 N. Y. 116.)

The so-called release does not, therefore, stand in plaintiff's way. We are unable to see that any interlocutory decree for any accounting was necessary. The amount of plaintiff's claim is not disputed. All questions concerning Bowen's receipts and disbursements while in possession of the property as trustee for the creditors, and all questions as to the disposition of the surplus moneys were settled and disposed of upon the settlement which resulted in the execution of the release above referred to. There is, therefore, nothing left to be the subject of an accounting.

In one respect, however, the judgment must be modified. It directs that Samuel T. Busey shall reconvey to Bowen, and that the

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latter shall be deemed to hold the property as trustee for himself plaintiff and the other creditors, and that he shall on demand execute a deed to plaintiff of such an undivided interest in the property as the sum of \$21,150 (the amount of plaintiff's claim) bears to \$87,371.85 (the aggregate of all the claims) upon receiving from plaintiff a like proportion of the sum of \$20,441.64, the amount paid upon the foreclosure of the Sondheim mortgage.

The evidence is that Bowen paid, or procured to be paid, \$30,000 upon the sale under the Sondheim mortgage, of which \$20,411.64 went to satisfy the foreclosure judgment, the balance constituting the surplus which was accounted for by Bowen and of which Eisert received and receipted for his proportion. If Bowen is to be held to have purchased the property as trustee for the creditors, he is entitled to be reimbursed what he paid out to acquire it, and that is the sum of \$30,000, and not merely so much thereof as went to satisfy the Sondheim mortgage.

The judgment must, therefore, be so modified as to require plaintiff to pay to Bowen, upon receipt of a deed, the stated proportion of \$30,000, with interest thereon from the date of sale, and as so modified should be affirmed, with costs.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, with costs. Settle order on notice.

MARY B. HAMLIN, Respondent, v. HERBERT W. HAMLIN and Others,
Appellants.

First Department, February 8, 1907.

Real property — acceptance of deed essential to pass title — facts not establishing acceptance — evidence varying written instrument — transactions with deceased.

While the fact that a fully executed and valid deed is found in the possession of the grantee raises the presumption of delivery and acceptance, the question is one of intention, and the presumption may be refuted.

To pass title, acceptance by the grantee is as essential as delivery by the grantor.

Proof tending to show that there was no intention to pass title does not fall within the condemnation of the rule prohibiting oral evidence to vary the terms of the written instrument.

When it is shown that a husband, engaged in a hazardous business, paid the consideration for real estate and had the deeds drawn in the name of his wife, but took a reconveyance thereof from his wife, which instruments he never recorded, but kept in his safe deposit together with insurance on the property, payable only to the wife, and there is evidence of repeated statements that he intended that the property should belong to his wife, and that the conveyance was made solely that he might use the property, if necessary, in a business emergency, a finding that there was no acceptance of the reconveyance by the husband is warranted by the evidence.

Evidence of transactions with one deceased, incompetent under section 829 of the Code of Civil Procedure, must be objected to as inadmissible under the statute in order that the error may be available on appeal.

MCLAUGHLIN and HOUGHTON, JJ., dissented.

APPEAL by the defendants, Herbert W. Hamlin and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 25th day of July, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

Robert A. Paddock, for the appellants.

Henry W. Taft, for the respondent.

SCOTT, J. :

This action, to remove a cloud upon plaintiff's title to real estate, presents an unusual state of facts.

The plaintiff on April 18, 1904, married Frederick R. Hamlin, now deceased. Shortly after their marriage Frederick R. Hamlin negotiated the purchase of the two pieces of real property involved in the action. One piece, situated at Bellport in Suffolk county, was conveyed to plaintiff on August 16, 1904, and the other, situated in the city of New York, was conveyed to her on September 7, 1904. Frederick R. Hamlin paid the consideration for both pieces of land, and it was at his instance that the deeds were made out to plaintiff. The deed to the house in the city of New York was placed on record the same day that it was executed, and the deed to the property in Suffolk county was placed on record some time afterwards.

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On September 8, 1904, the plaintiff executed deeds to her husband Frederick R. Hamlin, of both of these pieces of property. After his death, on November 27, 1904, the two deeds, both unrecorded, were found in a box belonging to him, and to which he alone had access, in a safe deposit vault. With them was found a policy of fire insurance originally issued to James O'Brien, the grantor of the New York property, on which appeared an indorsement dated September 9, 1904, reciting that the interest in the policy was vested in plaintiff "as owner." The two houses were used by Mr. and Mrs. Hamlin until his death, as their family residence and the expense of supporting them and making repairs and improvements were paid and borne by Mr. Hamlin.

The plaintiff's contention is that although the deeds from herself to her husband were voluntarily executed by her, and were permitted by her to come into and remain in his possession, there never had been in a legal sense a delivery to or acceptance by him so as to vest the title in him. The case in effect turns upon the question as to what were Frederick R. Hamlin's intentions in causing his wife to execute the deeds and intrust their custody to him, and her intention in so doing, and upon this subject a considerable amount of testimony was taken.

Of direct testimony there was little for of course the plaintiff's mouth was closed as to any statements made by her deceased husband except to the limited extent that the defendants permitted her to testify on that subject, or themselves offered evidence of her statements.

There was considerable evidence, however, as to declarations made by the deceased to various persons, both before and after the purchase of the property, respecting his intention that it should be the property of his wife. Before the purchase, and during the progress of his negotiations for the purchase he frequently declared to various persons that he intended to give the properties to his wife, and that he so intended to give them as a wedding present, and after the purchase, while the deeds to himself were resting in his box, he frequently declared that the properties belonged to his wife.

There was evidence on the part of the plaintiff that when the deeds from her to her husband were executed he told her that it

was simply to help him temporarily, in case he needed the money for his business, and that the properties were hers and that he would put the deeds in his safe deposit box and probably they would never be recorded, and that later, while he and she were at the Hot Springs, the deceased told her to remind him to destroy the deeds. The plaintiff's testimony was that she told this conversation to Herbert Hamlin, her brother-in-law, after her husband's death. Herbert Hamlin's version of her conversation on being called as a witness for the defendants is somewhat different. He testified that plaintiff told him that it was Frederick R. Hamlin's intention to give her the houses. That concerning the execution of the deeds she had stated to her husband that he need not be afraid to leave the title to the lots in her name, but that he had replied and had objected to that and said "that he did not want to feel that if he went broke in his theatrical business * * * the only property he had was out of his name." It appears that Frederick R. Hamlin's business was of such a nature that while at times he made large sums of money, he was also liable at times to suffer large losses.

It must, of course, be conceded that ordinarily the finding of a complete, fully executed and apparently effectual deed of conveyance in the possession of the grantee creates a presumption of delivery to and acceptance by him, although that presumption is capable of being refuted. The question after all resolves itself into one of intention which may be established by parol or circumstantial evidence. To make an effectual transfer of title to real estate by deed there must be delivery by the grantor and, what is quite as important, acceptance by the grantee; "there must be both a delivery and acceptance with the intent of making the deed an effective conveyance. * * * While the presumption is that a deed was delivered and accepted at its date it is a presumption that must yield to opposing evidence" (*Ten Eyck v. Whitbeck*, 156 N. Y. 341, 352; *Holbrook v. Truesdell*, 100 App. Div. 10), and proof tending to show that no transfer of title was contemplated does not fall within the condemnation of the rule prohibiting oral evidence to vary the terms of a written instrument. (*Higgins v. Ridgway*, 153 N. Y. 130; *Persons v. Hawkins*, 41 App. Div. 171.)

We are, therefore, at liberty in view of all the evidence in the case to consider whether or not Frederick R. Hamlin when he

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caused his wife to execute the deeds to himself and to intrust them to him intended thereby to vest the title in himself or, in other words, intended a delivery by her and an acceptance by himself, using these terms in their legal sense.

There are many reasons for thinking that he did not. In the first place such an intention would be at complete variance with all of his proven declarations, both before and after the transaction, as to his intention and desire that the property should be his wife's, and no reason is suggested in the evidence or upon the briefs why, if he had intended to take title himself, he should not have done so in the first instance without going through the useless form of having the conveyance first made to his wife with an immediate conveyance by her to him. It was said in *Ten Eyck v. Whitbeck* (*supra*) that the recording of a deed by a grantee is entitled to consideration upon the question of delivery, and in the absence of opposing evidence may justify a presumption to that effect. So in the present case the fact that Frederick R. Hamlin omitted to place his wife's deeds to him upon record is entitled to consideration as bearing upon his intention in procuring the deeds to be executed, as is the other circumstance that he kept along with the deeds in the box a fire insurance policy in favor of his wife in which she was specified as owner and which would have been valueless to him if the title to the property had been transferred to him. The question naturally suggests itself why, if Frederick R. Hamlin did not intend that the title to the property should vest in himself, did he procure the deeds to be executed and placed in his own custody. A possible answer may be found in his statement to his wife at the time the deeds were executed.

One version is that given in behalf of the defendants to the effect that he said he did not want to feel that if he went broke in his theatrical business the only property he had was not in his name. The other version, different in form but not in substance, was that he wanted the deeds to help him temporarily in case he needed the money for his business. As has been said, his business was precarious, subjecting him to the possibility of large losses, and it is by no means inconceivable that his purpose was to have the deeds ready so that, if the necessity arose, he might without delay invest himself

with the title to the property for the purpose of raising money. Such an inference as to his intention would entirely reconcile his repeated declarations respecting his wife's ownership of the property, with his apparently inconsistent act of having the deeds to himself executed. Upon the whole case we are satisfied that the finding of the trial court to the effect that there was no delivery of the deeds to or acceptance of them by Frederick R. Hamlin, and consequently that the title to the property never vested in him, was correct.

It remains but to consider the question as to the reception of the evidence of plaintiff respecting statements made to her by her husband. Such evidence was clearly incompetent and if the question as to its admission was properly raised it would be fatal to the judgment.

Throughout the trial there was manifested great care on the part of the court that no evidence forbidden by section 829 of the Code of Civil Procedure should be received, and offers of such evidence were repeatedly excluded upon objection. The plaintiff was asked concerning some conversation with her coexecutor, the defendant Herbert Hamlin. She was proceeding to relate what she told him as to her husband's statements. Defendants' counsel objected to what the husband said, and the court replied, "No, not what he said, but what she said to him," evidently referring to Herbert Hamlin. Counsel did not persist in the objection and took no exception. The witness then testified as to what she told Herbert Hamlin that her husband had said to her. Defendants' counsel moved to strike the evidence out, but no ruling was made and no exception taken. A colloquy then arose respecting the evidence, in the course of which the court stated he understood the witness to have testified to what she told her coexecutor, to which defendants' counsel replied, "If the record stands that way, very well." Later a motion was made to strike out all the testimony, but it was not placed upon the ground that it contravened the terms of section 829. It was upon the ground that it was immaterial, irrelevant and incompetent *and not within the issues*. There was certainly nothing in the motion to warn the court that the evidence was objected to as forbidden by section 829 of the Code of Civil Procedure, especially after counsel's acquiescence in the reception of the testimony a few minutes earlier.

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We are, therefore, of the opinion that the incompetency of the evidence is not so raised as to require us to reverse the judgment because of its admission.

The judgment should be affirmed, with costs.

PATTERSON, P. J., and LAMBERT, J., concurred; McLAUGHLIN and HOUGHTON, JJ., dissented.

McLAUGHLIN, J. (dissenting):

I am unable to concur in the prevailing opinion. The deed was duly executed, acknowledged and delivered. As to the delivery, I do not see how it could be established any more satisfactorily than by proving that the deed, at the time of the death of the grantee, was in a safe deposit box to which he alone, prior to his death, had access. The delivery, under such circumstances, amounts to more than a presumption (as to the intent of the grantor to make it an effective conveyance), and such deed cannot be overcome by proving vague and indefinite declarations of the grantee made prior and subsequent to it. If it can, then a deed of conveyance amounts to but little, and titles, as evidenced by such deeds, rest upon a very insecure foundation.

I also think the court erred in permitting the plaintiff, against the objections of the defendants, to testify as to certain statements made to her by her husband. The objections made to this testimony were specific enough, inasmuch as they must necessarily have apprised the court of the reason why it was claimed this evidence was not admissible.

HOUGHTON, J., concurred.

Judgment affirmed, with costs. Order filed.

WILLARD P. LITTLE and MICHAEL J. O'CONNOR, Composing the Firm of LITTLE & O'CONNOR, Respondents, v. TOM L. JOHNSON, as Executor, etc., of ALBERT L. JOHNSON, Deceased, Appellant.

First Department, February 8, 1907.

Evidence — transaction with decedent — indirect evidence of transaction incompetent.

Section 829 of the Code of Civil Procedure forbids not only direct testimony of personal transactions with a decedent, but also every attempt by indirection to prove the same thing.

Thus, when plaintiffs suing on a *quantum meruit* to recover for services in preparing plans for a house for the decedent are allowed over objection to testify to frequent interviews with the decedent respecting the plans while they were being prepared, and to a number of consultations and interviews when the plans were discussed, it is reversible error.

APPEAL by the defendant, Tom L. Johnson, as executor, etc., from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 1st day of May, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 30th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

Francis G. Caffey, for the appellant.

Richard O'Gorman, for the respondents.

SCOTT, J.:

Plaintiffs sued upon a *quantum meruit* for services alleged to have been rendered to defendant's testator in preparing certain preliminary studies for a city house. The plaintiffs produced, as the studies for which compensation was sought, a number of sketches, for the most part rough and obviously intended merely as suggestions of elevations and room plans. Of course, in order to recover it was incumbent upon plaintiffs to show that they had prepared the sketches under some employment or authorization by the deceased and some agreement, express or implied, upon his part to pay com-

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pensation therefor. The deceased owned no property in the city upon which to erect the house, and had not fully decided to acquire such property. He seems to have contemplated the possibility of acquiring property and building a house, and it is quite possible that plaintiffs' purpose in preparing the sketches was to induce him to carry his contemplated purchase into execution. Were it not for the admission of some evidence which we deem to have been improperly admitted, there would not have been sufficient evidence of employment to justify submitting the case to the jury. The plaintiff Little was called as a witness on his own behalf. Of course he could not testify, and was not permitted to testify as to any oral communication made to him by the deceased. The plaintiffs, however, sought to establish an implied promise on the part of the deceased to pay for the sketches, by showing that he had frequent interviews and consultations with them respecting the sketches while they were being prepared, and the plaintiff Little, under sufficient objections and exceptions, was allowed to testify that he had a number of consultations and interviews with deceased, and especially an interview with him and his wife, at which the plans were discussed between the witness and the wife of the deceased, and the witness further testified that a large part of the services for which compensation was sought consisted of these very consultations and interviews. Under the circumstance this evidence was clearly incompetent under section 829 of the Code of Civil Procedure. It is well settled that this section not only forbids direct testimony by a survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing. (*Clift v. Moses*, 112 N. Y. 426.) The plaintiffs sought to establish the fact that deceased had employed them and agreed to pay for their work, by way of inference from the fact that he constantly consulted with them while they were engaged upon the work. Little's testimony as to the fact and number of these consultations was, therefore, an attempt to prove by himself the facts as to the personal relations between himself and the deceased from which the inference of employment and promise were to be drawn. (*Lerche v. Brasher*, 104 N. Y. 157.) The admission of this evidence requires the reversal of the judgment.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment and order reversed and new trial ordered, costs to appellant to abide event. Order filed.

ALMA L. WELLS, Respondent, v. GRANT SQUIRES and GEORGE A. WELLS, as Executors, etc., of HENRY M. WELLS, Deceased, and Others, Appellants.

First Department, February 8, 1907.

Will — when absolute ownership of personal property not suspended.

There can be no suspension of absolute ownership of personal property when there are persons in being who unitedly can convey an absolute title.

The mere creation of a trust does not *ipso facto* suspend the power of sale.

Thus, when a will bequeaths the residuary estate in trust to pay over annuities to each of three beneficiaries named during their natural lives, and the payment of annuities is not limited to payment out of the income, but payment may be made out of the principal if necessary, there is no suspension of absolute ownership obnoxious to the statute.

The power of such beneficiaries to convey absolute title by uniting with the remaindermen and trustee is not prohibited by section 3 of the Personal Property Law forbidding the assignment by a beneficiary of the right to enforce a trust of personal property, as that section is limited to cases where the trust is to receive the income and apply it to the use of any person.

APPEAL by the defendants, Grant Squires and another, as executors, etc., and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of September, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

John J. Healey, Jr., for the appellants Wells.

Edward Bruce Hill, for the executors and Eliza L. Stone, appellants.

Vincent P. Donihee, for the respondent.

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SCOTT, J. :

This action calls in question the validity of the 6th article of the will of Henry M. Wells, deceased, and also the 3d article of the codicil to the will.

The 6th article of the will reads as follows : " I give, devise and bequeath unto Grant Squires, in trust, all the rest, residue and remainder of my estate, to the following uses and purposes : (1) To pay over therefrom unto my wife, Alma L. Wells, the sum of Twenty-one hundred dollars annually, in monthly payments of one hundred and seventy-five dollars each, during the term of her natural life (2) To pay over therefrom unto my cousin, Eliza L. Stone of Greenfield, Massachusetts, the sum of three hundred and sixty dollars annually, in monthly payments of thirty dollars each, during the term of her natural life. (3) To pay over therefrom unto my cousin, Helen A. Wells of Saratoga Springs, New York, the sum of two hundred and forty dollars annually, in monthly payments of twenty dollars each, during the term of her natural life, it being expressly understood and agreed that the foregoing provision for my wife shall be a first charge upon both principal and income of my estate, and is in lieu of her dower, thirds and exemptions."

The 3d article of the codicil increases the sum to be paid to the wife annually, and makes provision for the payment of the admission fee for Eliza L. Stone in case she should be received into a home for the care of aged women, but otherwise does not alter the provisions of the will.

The plaintiff asserts that the article and codicil are invalid and void because they unlawfully suspend the absolute ownership of personal property, of which alone the estate consists. It is observable that the direction for the payment of the annuities is not limited to their payment out of the income. Indeed the word "income" or "rents and profits" are not to be found in either article, except where the wife's annuity is made a first charge upon the principal and income. A gross sum is given to the trustee, and out of that sum, not alone out of its income, are the annuities to be paid. In other words, if necessary, the principal is to be used, and it appears that it will be necessary to use it.

It is perfectly well settled that there can be no suspension of absolute ownership when there are persons in being who can con-

vey an absolute title. The mere creation of a trust does not *ipso facto* suspend the power of alienation. (*Robert v. Corning*, 89 N. Y. 225; *Williams v. Montgomery*, 148 id. 519.)

If then there are persons in being who can, unitedly, give a perfect title, there is no suspension of alienation. The plaintiff's contention is that the title cannot be transferred, because the annuitants could not lawfully transfer their interests. This contention cannot be sustained. The prohibition against the assignment by a beneficiary of the right to enforce the performance of a trust of personal property is limited to cases where the trust is one to receive the income and apply it to the use of any person. The statute expressly provides that "the right and interest of the beneficiary of any other trust in personal property may be transferred." (Pers. Prop. Law [Laws of 1897, chap. 417], § 3, as amd. by Laws of 1903, chap. 87.) The trust in the present case is distinctly not a trust to receive the income and apply it to the use of any person, and cannot be construed as such by any known rule of construction. Consequently the interests of the beneficiaries are alienable and do not suspend the absolute ownership of the fund. (*Kane v. Gott*, 7 Paige, 521; 24 Wend. 641.) The annuitants, acting in conjunction with the trustee, could convey the estate to the remainderman, or they, with the remainderman, could convey to a third person. And if the annuitants and the remainderman united in an assignment, the trustee would be obliged to convey to the assignee. (*Coster v. Lorillard*, 14 Wend. 265.) No other objections to the validity of the will and codicil have been suggested and none present themselves to us.

It follows that the judgment appealed from must be reversed, without costs, and judgment entered in favor of defendants, declaring that the provisions of article 6 of said will as modified by article 3 of the codicil thereto are valid and effectual dispositions by the testator of his residuary estate.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment reversed and judgment ordered as directed in opinion. Settle order on notice.

OCCIDENTAL REALTY COMPANY, Respondent, v. WASHINGTON
PALMER, Appellant.

First Department, February 8, 1907.

Vendor and purchaser — equitable lien — vendee entitled to lien on lands to the extent of consideration paid.

The vendee of lands has an equitable lien thereon for the portion of the consideration thereof paid by him under the executory contract, or for sums expended in improvement, and may enforce that lien in equity so long as the failure to carry out the sale has not been the result of any default on his part.

The vendee may enforce his lien when the title proves to be unmarketable.

The lien rests wholly upon the theory that the vendor in equity holds the land in trust for the vendee in proportion to the part of the purchase money paid by the vendee or for sums expended in improvements.

The right of the vendee to enforce his lien in equity cannot be defeated upon the ground that there is an adequate remedy at law.

As the lien exists only for the portion of the consideration paid or moneys expended in improvement, the vendee is not entitled to a lien for the cost of examining the title.

In an action to foreclose such vendee's lien an extra allowance should be limited to five per cent upon the sum sought to be recovered and should not be figured upon the agreed price.

PATTERSON, P. J., dissented, with opinion.

APPEAL by the defendant, Washington Palmer, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of April, 1906, upon the decision of the court rendered after a trial at the New York Special Term adjudging that the plaintiff had acquired a vendee's lien against certain premises as purchaser from the defendant.

Isaac N. Miller, for the appellant.

Leo G. Rosenblatt, for the respondent.

SCOTT, J. :

Many, and perhaps most, of the objections to the title urged by plaintiff are insufficient to justify its refusal to perform, but I think there is a practical impossibility of accurately fixing the lines of the land proposed to be conveyed, and the difficulty arising therefrom

is accentuated by the fact that there appear to be encroachments upon the property. I think, therefore, that the title in its present condition may fairly be said to be so far unmarketable that the vendee is not bound to accept it. The serious question in the case is as to the relief to which plaintiff is entitled, and upon this question the appellant contends for a proposition which is contrary to the rule which has heretofore prevailed in every jurisdiction in which that branch of the law, which we know as equity, prevails. The rule which has obtained for many years in this country and in England is that the purchaser of land by an executory contract has an equitable lien thereon for any money paid by him under the contract, so that, in case he is entitled to recover such money back by means of the inability or refusal of the vendor to perform, he may do so by proceeding against the land. This is known as the vendee's lien and it is universally recognized, in equity, wherever the doctrines of equity prevail.

The ground upon which the lien exists is thus stated by Lord Chancellor WESTBURY in *Rose v. Watson* (10 H. L. Cas. 672): "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract in this sense, namely, that the ownership of the estate is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and to the extent of the purchase money so paid, does in equity finally transfer to the purchaser the ownership of the corresponding portion of the estate." This principle is so firmly established in this State that when lands have been sold by contract by a testator, the purchase price not having been paid, and the title remaining in him at his decease, the premises contracted to be sold are not to be considered as embraced in his real estate, for the interest remaining in the vendor is not real but personal estate. (*Lewis v. Smith*, 9 N. Y. 502.)

In such a case, upon the execution of the contract, the vendor becomes a trustee of the land for the purchaser, retaining a lien for the purchase price, and the vendee becomes the equitable owner of the land. (*Ferry v. Stephens*, 66 N. Y. 321; *Thomson v. Smith*,

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63 id. 303; *Potter v. Ellice*, 48 id. 323; *Baldwin v. Humphrey*, 44 id. 609.) If this be the true relation which equity recognizes between the parties to an executory contract of sale toward each other and toward the land which is the subject of the contract (and that it is the true relation I take it cannot be questioned), a vendee's lien for moneys paid on account of the purchase would seem to be a natural and necessary corollary, and so it has heretofore generally been considered to be. In England it was recognized in *Wythes v. Lee* (3 Drew. 396) in 1855, reiterated in *Rose v. Watson* (*supra*) in 1864, and again reiterated and enforced in *Whitebread & Co., Ltd., v. Watt* (L. R. 1902, 1 Ch. Div. 835).

Thus it was firmly established in England more than half a century ago, and has been repeatedly reiterated since, that a vendee had a lien for the consideration paid, and that equity will enforce it, and neither before 1855 nor since has there been any authority in that jurisdiction which has held to the contrary. That such a lien exists and that equity will enforce it, has been uniformly held in every State in this country in which the question has arisen. It would be wearisome to cite all the authorities to this effect. A few will suffice to indicate the universality of the rule. (Alabama, *Hickson v. Lingold*, 47 Ala. 449; Illinois, *Sweetisch v. Waskow*, 37 Ill. App. 155; Wisconsin, *Taft v. Kessel*, 16 Wis. 273; Mississippi, *Davis v. Heard*, 44 Miss. 50; North Carolina, *Costen v. McDowell*, 107 N. C. 546; Tennessee, *Jones v. Galbraith*, 59 S. W. Rep. 350; Kentucky, *Bullitt v. Eastern Kentucky Land Co.*, 99 Ky. 324; Indiana, *Coleman v. Floyd*, 131 Ind. 330; *Shirley v. Shirley*, 7 Blackf. 452.) In California and North Dakota the Civil Codes specifically provide for a vendee's lien (Cal. Civ. Code, § 3050; N. D. Rev. Codes [1899], § 4834 [Civ. Code, § 1805]), and that such a lien exists and will be enforced in equity is stated by the text writers of the highest fame and authority and questioned by none. (Pom. Eq. Juris. [3d ed.] § 1263; Washb. Real Prop. [6th ed.] § 1039; 2 Story Eq. Juris. [13th ed.] § 1217; Jones Lien [2d ed.], §§ 1105, 1106; Fry Spec. Perf. [3d Am. ed.] § 1452.)

In our State the vendee's lien has frequently been recognized. (*Clark v. Jacobs*, 56 How. Pr. 519; *Parks v. Jackson*, 11 Wend. 442; *Tompkins v. Seeley*, 29 Barb. 212; *Gibert v. Peteler*, 38 N. Y. 165; *Chase v. Peck*, 21 id. 581.) The whole weight of

authority is thus to be seen to be in favor not only of the existence of a vendee's lien, but of the vendee's right to enforce it in equity, provided always, of course, that the failure to carry out the contract of sale has not been the result of any default on his part. Not only is the lien and its enforceability in equity supported by this great weight of authority, but there is absolutely no authority to the contrary save the case of *Klim v. Sachs* (102 App. Div. 44), a case which has not, as yet, been followed in this department. (*Smadbeck v. Law*, 106 App. Div. 552.)

In *Klim v. Sachs* (*supra*) the learned court held that no lien existed in behalf of a purchaser when nothing more appeared than that the vendor was unable to convey the title which he had contracted to convey and seems to have considered that such a lien attached only when the purchaser had gone into possession under the contract of sale and had made improvements on the land upon the faith thereof. In support of this view the court cited *King's Heirs v. Thompson* (9 Pet. 204) and *Gibert v. Peteler* (38 N. Y. 165). An examination of these cases shows that while they support the proposition that a purchaser going into possession under a contract of sale and making improvements upon the faith thereof may have a lien for the money thus expended, they contain nothing limiting a vendee's lien to such a case. On the contrary, in both cases the lien was allowed specifically upon the ground that the moneys paid out for improvements constituted part payment of the consideration which the vendee was to pay for the land. It is said that in all the cases (at least in the appellate courts) in which a vendee's lien has been sustained in this State, there have been found other equities in favor of the vendee besides the mere fact of the vendor's inability or refusal to completely perform his contract. It is quite true that in many of the cases there have been other matters which have been much discussed, but I have been able to find none in which the right to a lien and to enforce it has been made to depend in the slightest degree upon any equities in favor of the vendee apart from the fact that he has paid a part of the consideration and that the vendor has failed to perform.

In *Tompkins v. Seeley* (*supra*) the court found strong equities in favor of the vendee, but these influenced the court, not in awarding him a lien, but in holding him free from any obligation to com-

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plete the purchase, which was the real matter in dispute. In *Parks v. Jackson* (*supra*) the vendee's right to a lien seems to have been recognized on all hands, the only question discussed or determined being as to the sufficiency of notice to the vendee in possession of the pendency of a suit to set aside a deed to one of his predecessors in title. In *Gibert v. Peteler* (*supra*) the recognition of the vendee's lien was not made to depend upon any special equities. The only question was whether the lien should be extended to certain moneys laid out in improvements on the property by the vendee, and the lien was thus extended because the moneys so laid out constituted, in effect, a part of the consideration, it having been stipulated in the contract that the purchaser should make the improvements before becoming entitled to a conveyance. I affirm, therefore, with confidence that no case can be found in this State, or in any other, save only *Klim v. Sachs*, wherein the existence of special equities has been made the ground for enforcing a vendee's lien, which otherwise would have been disallowed. That there have been few adjudications upon the subject, and fewer still where no other question was involved, is no argument against the existence of the lien or its enforcement in equity, but rather a tribute to the learning and conservatism of our conveyancing bar who have forborne to present to the courts for decision a question already thoroughly decided on reason and authority.

The right of a vendee to a lien, and to invoke the aid of equity to enforce it cannot be defeated upon the ground that he has an adequate remedy at law for damages. As well refuse a decree for the foreclosure of a mortgage because the mortgagee can collect his debt at law. To oust equity of its jurisdiction the legal remedy must be as efficient as the remedy both in respect to the final relief and the means of obtaining it. (*Kilbourn v. Sunderland*, 130 U. S. 505, 514.) It certainly cannot be contended for an instant that an action for damages, with the more or less doubtful chance of collecting the judgment by execution, is equal in efficiency or certainty to the remedy of foreclosing the lien in equity. It certainly would be far from equal in a city like this, where the transactions in real estate are of great number and are, no doubt, frequently entered into between total strangers. Under our cumbersome and complicated system of transmitting title to lands, and

establishing liens thereon, it is absolutely necessary that some time shall elapse between the making of a contract for sale, and actually consummating the transfer. It would be unreasonable in most cases to expect to find a seller content to tie up his property by a contract to convey unless he received some payment on account, or other security, to protect him from loss if the purchaser refuses to complete the contract, and yet it would be equally unreasonable to expect a purchaser to be willing to pay part of the consideration upon signing the contract, if he had no better prospect of protection in case of a defective title, or the vendor's default, than an action at law for damages, with no recourse against the land. Any practical objection to the existence of a vendee's lien, based upon the supposed inconvenience to the vendor of having a *lis pendens* filed against his property, has been removed by the amendment to section 1671 of the Code of Civil Procedure by chapter 60 of the Laws of 1905, which permits such a *lis pendens* to be canceled upon the giving of a proper security. The rule that a vendee, without fault himself, shall have a lien, enforceable in equity, for so much of the consideration as he has paid is reasonable and fair; makes for safety and fair dealing in real estate transactions, and is supported by an overwhelming weight of authority. In my opinion we should not lend our aid to breaking it down.

We find no satisfactory authority, however, for extending the lien so as to cover the cost of examining the title. This is undoubtedly an item of plaintiff's damage, but it is neither money paid as part of the consideration nor money expended in improvements upon the property, and the principle of law upon which the doctrine of a vendee's lien rests does not warrant such an extension of the lien.

We also think that the extra allowance should have been limited to five per cent upon the sum sought to be recovered by the plaintiff. In one sense, the whole consideration was involved, but practically the controversy turned upon the plaintiff's right to recover its deposits.

With these modifications the judgment should be affirmed, with costs.

INGRAHAM, McLAUGHLIN and HOUGHTON, JJ., concurred;
PATTERSON, P. J., dissented.

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PATTERSON, P. J. (dissenting):

The question arising upon the appeal from the judgment in this action is presented to this court in this department directly for definite decision for the first time, and that question is whether, simply on the default of a vendor in performing an executory contract for the sale of land, the vendee, seeking to recover a deposit made on account of the purchase money and the expenses of examining the title to the premises embraced in the contract, may have not only an equitable lien imposed upon such premises, but also a decree of foreclosure and sale, with the same effect as if he were a mortgagee *pro tanto* of such premises.

The facts of the case are simple. The defendant agreed to sell and convey to the plaintiff certain premises in the city of New York, for the stipulated sum of \$8,500, of which \$500 were to be paid at the time of the execution of the contract and \$8,000 on the delivery of the deed and the closing of title. Five hundred dollars were paid. On an examination of the title by the purchaser there were various defects disclosed, such as incumbrances, encroachments and slight deficiencies in quantity, or, at least, such vagueness and uncertainty in description as made it difficult to determine what property would pass under a deed. The plaintiff declined to complete the purchase, and I will assume, for the purposes of this decision, that some, at least, of its objections were well founded and that it was justified in refusing to take the conveyance and pay the residue of the purchase money. Thereafter the plaintiff began this action, and in its complaint sets forth the transaction with the defendant and makes appropriate allegations concerning the payment of the deposit money and the outlay for examining the title, and then specifically asks that a lien be declared to exist in its favor upon the premises for the amount of both the deposit and the outlay for examining the title, and prays that a foreclosure of such lien and a sale of the property be directed. The learned judge at Special Term has granted to the plaintiff all the relief it sought, has directed a sale of the right, title and interest of the defendant in the premises and what shall be done with surplus money arising after a sale. The learned judge held that the plaintiff was entitled to a vendee's lien, based upon the theory that the vendor became a trustee of the land which he had sold and held in trust for the

vendee the moment he received part payment under the contract, and that the vendee's part payment operated immediately to effect an equitable conveyance of the land to the extent of the money which he had invested in it, and gave as his only authority for this proposition the case of *Whitebread & Co., Ltd., v. Watt* (L. R. 1902, 1 Ch. Div. 835). The authority cited undoubtedly declares the law in England to be as stated by the learned trial justice, and there can be no doubt that in this jurisdiction a vendee's lien may also exist arising out of a similar relationship between the vendor of real property and a purchaser; but it has not been held by the courts of final authority in the State of New York that a vendee's lien may be enforced by foreclosure and sale in every case of default by a vendor in the performance of his executory contract. Singular as it may appear, the doctrine of a vendee's lien was never judicially established in England by controlling authority until the year 1855. Before that time there had been discussion and speculation upon the subject and dicta of judges are to be found in the books tending to the recognition of such a lien, but it was not until the case *Wythes v. Lee* (3 Drew. 396) that it was directly recognized. In that case Vice-Chancellor KINDERSLEY states in his judgment "no case is produced in which the particular point has been determined or even directly raised. Counsel on both sides agree that no such case can be found; and it is extraordinary, considering the number of instances in which the question might have arisen, that there is no single case *in which any such claim has ever been even attempted by a purchaser*. There have been a few cases in which the purchaser has applied for the return of his deposit; but in those cases there has not been even a suggestion that he was entitled to a lien." In that case the vendee's lien was sustained, and it was supposed to rest upon natural justice and that it might be spelled out from general principles of equity. The case arose upon demurrer to a bill. It is only authority for the proposition that such a lien may exist. The grounds upon which it may be maintained do not seem to have been definitely stated until the case of *Rose v. Watson* (10 H. L. Cas. 672), which was decided in 1864. The judgments in that case were delivered by the Lord Chancellor (Lord WESTBURY) and Lord CRANWORTH, but the grounds upon which they place their conclusions do not seem to have received the full concurrence of all the judges who sat in

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Whitebread & Co., Ltd., v. Watt (supra). Nevertheless, it may be assumed that in England a vendee's lien, pure and simple, may be established and enforced in equity; but no such determination, upon what seems to be conceded was a novel doctrine in England, has ever been made by any court of final authority in the State of New York unless there were some equities apart from the mere fact of a deposit having been made and expenses incurred, which called for the exercise of the jurisdiction of a court of equity. As an illustration, such supervening equities as the insolvency of a vendor, the entry of the vendee into possession and his making improvements or incurring other expense in connection with the premises, the subject of the contract, have been regarded as entitling the vendee to enforce a lien in equity; and even in the two leading authorities in England (*Rose v. Watson* and *Whitebread & Co., Ltd., v. Watt*) the fact appeared that the vendor in each case was insolvent. It may not be said with absolute certainty that that fact was controlling in the decision in either case. But in all the adjudications in the State of New York, with the exception, perhaps, of some Special Term decisions, the intervention of special equities has been made to appear whenever a vendee's lien had been enforced. In *Tompkins v. Seeley* (29 Barb. 212) the purchaser had entered upon the premises and made improvements thereon, and there were other equitable considerations also presented in the record. In *Parks v. Jackson* (11 Wend. 442) the purchaser made valuable improvements upon the property. In *Gibert v. Peteler* (38 N. Y. 165) the vendees were in possession, and made improvements in accordance with the contract, which required certain expenditures as a necessary condition to entitle them to a deed. *Chase v. Peck* (21 N. Y. 581) went upon special equities, and does not apply here.

It is suggested by the respondent in the present case that a special equity does appear, namely, that the vendor represented that he was the owner of the premises the subject of the contract, and that the deposit of \$500 was paid upon that representation; but there is nothing to show that Palmer made a willful, false representation. In every contract for the sale of real estate the purchaser must make it upon the belief that the person with whom he is contracting has the ability to perform the contract. There is no special

equity arising upon the statement of a person contracting to sell real estate that he is the owner of the land if, upon examining the title, it is disclosed that such title is affected by trammels and impairments which prevent his making an absolute conveyance thereof free from all legal objection. There is no evidence of bad faith on the part of the vendor in this action.

As I look at this record it merely presents the case of a person who is entitled to recover at law the amount of a deposit which he has made upon a contract for the purchase of land, which contract has failed by reason of the inability of the vendor to make title, the purchaser being also entitled to recover at law the amount he had expended in searching the title. The right to enforce a vendee's lien in equity, in such circumstances, has been passed upon and determined adversely to the right in the case of *Klim v. Sachs* (102 App. Div. 44). That was an action for specific performance brought by the purchaser against the vendor. There the plaintiff refused to accept a deed on the ground that the title was unmarketable because of certain encroachments of adjoining buildings upon the premises and also because the buildings on the property to be conveyed encroached upon the street, and he asked that if the defendant could not specifically perform he should have judgment for the amount deposited and for expenses of examining the title, and that judgment be impressed as a lien upon the land described in the contract. The justice at Special Term granted the full relief, but it was held by the Appellate Division that the judgment was erroneous in so far as it impressed the sum, together with interest and costs, as a lien upon the premises which were the subject of the contract, and the court struck from the judgment such portions thereof as related to the alleged lien and the foreclosure thereof and affirmed the money judgment for the deposit and the expenses.

In what may be considered the pioneer case of *Wythes v. Lee* (*supra*) the learned vice-chancellor, referring to the embarrassment which existed by reason of the want of authority upon the subject, said: "I should feel much pressed by the absence of any such cases if I could see that maintaining such a lien could be attended with danger or inconvenience. But I do not see any inconvenience in establishing the rule. I do not see any hardship in it." The inconvenience and the hardship are made manifest in this case.

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There is but one breach of an executory contract. By the decision about to be made the vendee is allowed to enforce a lien upon the land for the amount of its deposit and to sell the land under foreclosure of the lien, but there still remains a claim for the expenses incurred in examining the title to the property the subject of the contract, for which it is declared no lien exists, and for satisfactory reasons. The vendee is certainly entitled to recover for such expenses. Is the vendor to be subjected to another suit, one at law, to recover them? Are two actions to be allowed for the breach of the same contract? Why should the vendor be vexed twice? If in the same action the lien may be enforced and a recovery had for the expenses of searching the title, the vendor is entitled to a trial by jury of the common-law claim. A judgment would provide for the lien and its foreclosure and also for a recovery of a sum of money for the collection of which an execution would issue and thus for a breach of the same contract, the vendor is to have his real property sold under foreclosure and an execution against his personal property to recover the damages on the common-law cause of action. The inconvenience and the hardship are apparent at once. There is no doubt that such a thing as a vendee's lien exists, but the question is whether, in the absence of any special equity, such a lien will be enforced by foreclosure, where from all that appears an adequate remedy exists at law. In that aspect of the case, I think the judgment now appealed from should be reversed.

Judgment modified as directed in opinion, and as modified affirmed, with costs. Settle order on notice.

WILLIAM A. BURNHAM and HENRY W. MUNROE, as Executors, etc.,
of MARY A. H. MUNROE, Deceased, Plaintiffs, v. WILLIAM
HUBBARD WHITE, Defendant.

First Department, February 8, 1907.

Will — implied power to sell real estate — when title offered by executors marketable.

It is a general rule that a power of sale will be implied where the manifest intent of the testator requires that real estate should be sold and converted into

money in order to carry out the provisions of the will. The application of the rule depends upon the particular provisions of the will in question.

When a testatrix in creating a trust for the benefit of children living at her death, or for the issue of those who have predeceased her, provides that the executors shall "pay over" to the beneficiaries their "part or portion" of the estate, and speaks of the "portions or parts of such sums set apart" for the use of the beneficiaries, and uniformly throughout the clauses making disposition of the property uses the words "pay over" the portions "of said fund," and provides that "upon all sales" which may be made by the executors the purchasers shall not be answerable for a misapplication of the proceeds by the executors, it is clear that the testatrix intended that her estate be converted into money, and the executors have an implied power of sale.

The implied power of sale is so clear as to impose no cloud upon the title, and a vendee will be decreed to accept the deed tendered by the executors.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Frederic D. Philips, for the plaintiffs.

Harold Swain, for the defendant.

SCOTT, J. :

This controversy comes before the court upon an agreed statement of facts, and involves the question whether or not the will of Mary A. H. Munroe, deceased, confers upon her executors an implied power to sell her real estate, for it is obvious and conceded that the will contains no express power of sale. Upon the determination of that question depends the other, which is whether or not the defendant shall be required to accept the deed tendered him by the plaintiffs in fulfillment of their contract to convey to him a piece of real estate in the city of New York. The general rule is not questioned that a power of sale will be implied when the manifest intent of the testator requires that the real estate should be sold and converted into money in order to carry into effect the provisions of the will. Although the question has been presented and discussed in many cases, no real advantage is to be derived from citing and comparing them, because in each case the application of the established rule must depend upon the particular provisions of the will under examination.

Mrs. Munroe's will gives all of her estate, real and personal, to plaintiffs, as trustees, with instructions to divide the same into as

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many equal portions or parts as there may be children of hers living at her decease, or who, having predeceased her; shall have left lawful issue remaining at the time of her decease, setting apart for such issue of each child so deceased the share or shares to which its or their parents would have been entitled if living. The disposition of the several shares by the trustees is thus provided for: "That they shall *pay over* to each of my sons, other than my son John Munroe, *his part or portion* to be held in each case by him, his heirs, executors, administrators and assigns to his and their use and behoof forever."

"The *part or portion* of my said son John Munroe, my trustees under this my will shall hold and manage in such manner as they shall judge beneficial for him * * *.

"The portions or parts of *such sums* set apart for the use and benefit of my daughters, my trustees under this my will shall hold and manage in such manner as they shall judge beneficial for my said daughters. * * * And upon the death of each of my said daughters my said trustees shall *pay over* in each case the portion or part of *said fund* then held by them for the benefit of such daughter so dying to such person or persons as my said daughter so dying may by her last will and testament in writing direct and appoint to receive the same, and in case of failure of any daughter so to direct and appoint, then my said trustees shall *pay over* such portion or part of *said fund* held by them * * *."

In case of issue of testatrix's children who predecease her, the direction is that when such issue shall arrive at the age of twenty-one years the trustees "shall *pay over* to such grandchild its proportion of *all the fund* held by my trustees in trust for the benefit of such lawful issue so surviving at said age."

Finally, in the 4th clause of the will is to be found this significant paragraph: "*Upon all sales* which may be made by me (*sic*) trustees I will and declare that the receipts of my trustees shall exempt the purchaser or purchasers from being answerable for the misapplication or non-application of the purchase money, or being concerned to see the application thereof."

An examination and analysis of the will discloses, as the clear, controlling scheme adopted by the testator, that the estate shall be divided into separate parts or portions, one for each child, and

throughout the instrument she uses words which are aptly used if her intention is found to be that her estate shall be converted into money, but are in many instances quite inconsistent with the idea that any part of it should be retained in the form of real estate. Where she provides that certain of her sons shall take their shares outright her direction is that her trustees shall "pay over" to each son his part or portion. These words are peculiarly applicable where the subject of transfer is money, and would be entirely inapplicable to a transfer or conveyance of real estate. So in case of a daughter who dies the direction is that the trustees shall "pay over" the portion or part of said "fund" then held by them for the benefit of the daughter, and a similar provision is made with respect to grandchildren, to whom, on the attainment of their majority, are to be "paid over" their respective proportions of "all the fund" then held by the trustees for their benefit.

It is thus found that throughout the entire will the part or portion allotted to a beneficiary is designated as a "fund," and whenever the trustees are to transfer any part of the estate to a beneficiary the invariable mandate is to "pay over." The will is conventional in form, is couched in well-chosen language, and seems to be an instrument to which may well be applied that rule of testamentary construction which requires that words shall be taken in their primary and customary sense. A "fund," as generally understood and defined, means a sum of money, and as has already been said we commonly use the words "pay over" with reference to money, and never as the equivalent of the conveyance or transfer of real estate. We thus find that the will uniformly uses words which are applicable to money, and seldom or never uses words which are applicable to the transfer of real estate. The conclusion is irresistible that it was the intention of the testatrix that her estate should be converted into money, or its equivalent in personal property, and that it was no part of her intention that so much of her estate as consisted of real estate should be retained as such.

It follows that to carry out this intention the real estate must be sold, and an implied power of sale, therefore, rests in the trustees. We do not consider that the existence of this implied power is involved in any such doubt as would impose upon a purchaser a clouded title, or one which is unmarketable.

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The plaintiffs are entitled to judgment that the defendant perform his contract of purchase.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment ordered for plaintiffs. Settle order on notice.

ABRAHAM ELTERMAN, Appellant, v. JACOB HYMAN, Respondent.

First Department, February 8, 1907.

Practice — case on appeal — requests to find not part of judgment roll.

In trials by the court or before a referee, the formal decision directing a judgment must contain every finding of fact made by the justice or referee, and no fact not thus incorporated in the decision forms any part of the judgment roll or the case on appeal, or can be considered for any purpose by the appellate court. A party has no right to incorporate in a judgment roll or case on appeal his requests to find submitted to the court or referee under section 1023 of the Code of Civil Procedure, unless the court refuses to find, in which case the requests refused may be inserted in the appeal book, unless incorporated in the decision.

The practice of incorporating the requests to find is without authority and is discountenanced. Propositions which are found should be inserted in the decision, and if by inadvertence they are omitted, the decision should be reset-tled so as to embrace them, and a defeated party wishing to take advantage upon appeal of a finding so made must see to it that the finding is properly incorporated in the decision.

It follows that an appellant can take no advantage of any supposed inconsistencies between the facts as found at his request and those appearing in the formal decision.

APPEAL by the plaintiff, Abraham Elterman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 1st day of February, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

Edward W. S. Johnston, for the appellant.

Isidor Wasservogel, for the respondent.

SCOTT, J. :

The plaintiff sues to recover an amount of money paid by him upon a contract for the purchase of real estate, and his expenses incurred in examining the title, and to establish a lien therefor. The court below has found the objections to the title to be unsubstantial, and insufficient to warrant the plaintiff's refusal to complete the contract, and upon the findings of fact embraced in the decision, all of which find support in the evidence, we conclude that the judgment below dismissing the complaint was right and should be affirmed.

It would be unnecessary to say more were it not for the fact that the case presents, in an extreme form, a method of making up the judgment roll and appeal book which is not uncommon, and yet is entirely unauthorized by the Code of Civil Procedure or by the rules of the court.

The appellant calls our attention to certain findings of fact which, as he asserts, are inconsistent with each other, and invokes the well-established rule that where there are conflicting findings the appellant is entitled to the one most favorable to himself. The judgment is based upon a written decision signed by the justice who tried the case, and containing findings of fact and conclusions of law.

We find no inconsistent findings in this decision. We do find, however, in the appeal book, and apparently bound up as a part of the judgment roll, a paper entitled "Plaintiff's requests to find," and containing a request to the justice to find thirty-six distinct statements of fact, some of which are marked "found" and some of which are marked "refused." The inconsistencies upon which appellant relies are said to be between certain of these propositions thus marked "found," but not embraced in the signed decision, and other findings of fact which are embraced in the formal, signed decision.

We assume, although the fact does not clearly appear, that the words "found" and "refused" indicate the disposition made by the justice of the requests presented to him. Section 1022 of the Code of Civil Procedure provides that: "The decision of the court or the report of a referee upon the trial of the whole issues of fact must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so

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filed shall form part of the judgment roll." Section 1023 provides as follows: "Before the cause is finally submitted to the court or the referee, or within such time afterwards, and *before the decision or report is rendered*, as the court or referee allows, the attorney for either party may submit in writing a statement of the facts which he deems established by the evidence and of the rulings upon questions of law which he desires the court or the referee to make. * * * *At or before* the time when the decision or report is rendered, the court or the referee must note in the margin of the statement the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement thus noted; but an omission so to do does not affect the validity of the decision or report. An exception may be taken to a refusal of the court or referee to find any request thus submitted."

The plain meaning of the Code is that the formal decision directing the judgment to be entered must contain every finding of fact made by the justice, and that no fact not thus incorporated in the decision forms any part of the judgment-roll, or case on appeal, or can be considered for any purpose by the appellate courts. No party has the right to present propositions after the cause has been finally submitted to the justice, unless his time to do so has been expressly extended, and in any event such propositions must be submitted before the decision, for it is expressly required that they shall be passed upon at or before the decision is rendered, and not afterwards. Being so presented and passed upon, these propositions which are found should be inserted in the decision, and if, by inadvertence, they are omitted therefrom the decision should be resettled so as to embrace them, and if the defeated party wishes to take any advantage upon appeal of a finding so made it is incumbent upon him to see to it that the finding is properly incorporated in the decision. It is only to a refusal to find that an exception lies, and it is only these requests which are refused which have any proper place in the appeal book, unless incorporated into the decision. Although this plain and obvious requirement of the Code of Civil Procedure is seemingly often overlooked, attention has frequently been called to it by appellate courts. (*Schultheis v. McInerney*, 27 Abb. N. C. 193; *Nobis v. Pollock*, 53 Hun, 441; *O'Brien v. Buffalo Traction Co.*, 31 App. Div. 632; *affd.*, 165

N. Y. 637; *Hudson & Manhattan R. R. Co. v. Jackson*, 115 App. Div. 168.) In *O'Brien v. Buffalo Traction Co.* (*supra*) the precise question arose which is presented by the appellant here, and the court said: "If it be urged that this conclusion is contrary to the second finding of fact not embraced within the signed decision of the court, but found upon the request of the plaintiff and stated outside of the decision, it must be answered that since the amendment of the Code of Civil Procedure in 1894 (Chap. 686, Laws of 1894*) a trial court or referee is without power to find facts not embraced within the decision signed, and in case a court or referee assumes to find and state facts outside of the signed decision which are inconsistent with the facts admitted in the pleadings and those found in the signed decision, the facts found and stated outside of the signed decision will be disregarded on appeal." In *Hudson & Manhattan R. R. Co. v. Jackson* (*supra*) we held very recently that the report of a referee should be returned to him to include in his report findings of fact made at the request of a party, but not included in the report. It follows that upon the record before us the appellant can take no advantage of any supposed inconsistency between the facts as found and embraced in the formal signed decision and those found at his request but not incorporated into the decision.

The judgment must be affirmed, with costs.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

*See Laws of 1894, chap. 688.—[REPLACED]

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In the Matter of Proving the Last Will and Testament of CHARLES RUBENS (Also Known as SAMUEL WOOG), Deceased, as a Will of Real and Personal Property.

HENRY R. ICKELHEIMER, as Executor, etc., of CHARLES RUBENS, Deceased, Appellant; MAURICE DREYFUS and Others, Respondents.

First Department, February 8, 1907.

Practice—Surrogate's Court—when leave to amend petition asking probate of will should be granted.

The modern tendency is to afford litigants every reasonable opportunity, if seasonable application be made, to put their pleading in such form as they consider will best present their contention as to the question at issue. This practice tends to promote the ends of justice and to prevent technical and inadvertent errors.

Hence, if a petition for a probate of a will alleges that the deceased was a resident of France and died leaving assets in this State, and the probate is contested upon the ground that the will was not executed according to the laws of France, the petitioner should be allowed to amend his petition to allege that the testator was a resident of this State temporarily residing abroad.

APPEAL by Henry R. Ickelheimer, as executor, etc., of Charles Rubens, deceased, from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 24th day of December, 1906, denying the appellant's application for leave to amend the petition filed herein.

Paul Fuller, for the appellant.

J. Woolsey Shepard, for the respondents.

Delos McCurdy, for Jennie King and Marie H. Seeligman, legatees.

SCOTT, J.:

The petitioner appellant, being one of the executors named in a paper purporting to be the will of Charles Rubens, deceased, filed in the surrogate's office on July 19, 1906, a petition asking that said paper be admitted to probate as the last will and testament of said Rubens. The petition contained the following allegation: "That the said deceased was at the time of his death a resident of the city of Paris, France, and departed this life in said city of Paris, France, on the 1st day of June, 1906, leaving assets within

the State and county of New York." A number of the next of kin have filed objections to the probate, alleging, among other things, that the deceased, at the time he executed the alleged will, was a resident of and domiciled in the city of Paris, France, and that the said alleged will was not executed according to the laws of the said deceased's residence, to wit, the Republic of France, and hence that the surrogate has no jurisdiction to entertain the proceeding for the probate of said will or to admit it to probate. Said objectors seem to be disposed to urge, if we may judge from their briefs, that this particular objection is sought to be established by the statement quoted above from the petition. The petitioner now seeks to amend his petition by alleging, in place of the allegation quoted above, the following: "That the said deceased departed this life on the 1st day of June, 1906, at the city of Paris, France, where he then was and had for many years previous to his said death, been a sojourner or temporary resident, leaving assets within the State and county of New York. That he was at the time of his death a citizen of the United States, and a domiciled resident of the city and county of New York."

The surrogate denied the motion for the amendment of the petition.

We are of the opinion that the motion should have been granted. The modern tendency has been to afford litigants every reasonable opportunity, if seasonable application be made, to put their pleadings into such form as they consider will best present their contention as to the questions at issue. This practice tends to promote the ends of justice and to prevent the doing of injustice through technical or inadvertent errors of pleading. If the petitioner, through inadvertence or mistake, failed to present the facts concerning the residence and the domicile of the deceased, as they really are, and should thereby be considered as having made an admission fatal to the granting of his petition, most grave injustice might be wrought, not alone to him but to the legatees named in the will, who are certainly not chargeable with any erroneous statement which may have crept into the petition. On the other hand, no injustice whatever can result to any one, legatee or contestant, if the petitioner be allowed to so frame his petition that the actual facts of the case, whatever they may be, may be elucidated and laid before the surrogate for his consideration.

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The order must, therefore, be reversed and the motion granted, with ten dollars costs and disbursements in this court payable out of the estate.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Order reversed, with ten dollars costs and disbursements payable out of the estate, and motion granted. Order filed.

SAMUEL LUDLOW, JR., Respondent, v. RIGAL D. WOODWARD,
Appellant.

First Department, February 8, 1907.

Bills and notes — pleading — answer not stating defense.

When it is conceded that a promissory note made by the defendant was indorsed by the payee to a bank for value before maturity, and that the latter was holder in due course, it is no answer to allege that the transferee of the bank is not a *bona fide* owner and holder of the note, and that the note, after maturity and payment, was delivered by the bank for no value, and that the plaintiff is maintaining the action for the benefit of the original payee, and is not the real party in interest.

Such allegations are mere conclusions of law, and the answer does not comply with section 500 of the Code of Civil Procedure, which requires new matter constituting a defense or counterclaim to be stated in ordinary and concise language, without repetition. Allegations of conclusions of law do not fulfill this requirement.

The allegation that the note was transferred to the plaintiff "after maturity and payment" does not state facts showing payment.

Nor is the allegation that the transfer was without consideration a defense, for a holder may transfer negotiable paper without consideration, and the transferee stands in the shoes of the transferor.

PATTERSON, P. J., and HOUGHTON, J., dissented.

APPEAL by the defendant, Rigal D. Woodward, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of October, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the plaintiff's demurrer to the first defense in the amended answer.

W. E. Kisselburgh, Jr., for the appellant.

David T. Davis, for the respondent.

LAMBERT, J. :

The defendant has, on two previous occasions, answered the plaintiff's complaint, and the plaintiff demurs to this third effort to set up a defense to the cause of action alleged in the complaint. The action is brought on a promissory note made by the defendant to the order of one McCuaig, which note was indorsed to the Sovereign Bank of Canada for value before maturity. This much is conceded, and the bank thus became the owner in due course of business, and the note was unquestionably a valid obligation in the hands of the bank, regardless of equities between the maker and McCuaig. The answer alleges that the "defendant is informed and believes that the said Samuel Ludlow, Jr., the plaintiff in the above-entitled action, is not a *bona fide* owner and holder of said note, the subject of this action; that the said note after maturity and payment was delivered to the plaintiff by the Sovereign Bank of Canada for no value, and that the said plaintiff is maintaining this action for the benefit of said McCuaig, and is not the real party in interest."

The allegation that the plaintiff "is not a *bona fide* owner and holder of said note," is clearly a conclusion of law not admitted by the demurrer, and the further allegation "that the said plaintiff is maintaining this action for the benefit of said McCuaig, and is not the real party in interest," is subject to the same comment. (*Twelfth Ward Bank v. Brooks*, 63 App. Div. 220.) The Code of Civil Procedure requires (§ 500) that the answer must contain a "statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition," and the mere affirmative allegation of conclusions of law does not meet this requirement. And the very vague and indefinite allegation "that the said note after maturity and payment was delivered to the plaintiff by the Sovereign Bank of Canada for no value," is not stating new matter constituting a defense in that "ordinary and concise language" which common fairness and good pleading demand. There is no allegation as to who made the payment, or that any one in fact made a payment, and the fact that the note may have been

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transferred to the plaintiff, without consideration, by the bank which had come into possession of the same in due course, is not a defense to this action, in the absence of some allegation that the plaintiff was a party to the alleged fraudulent inception of the note. The bank, as the owner and holder of the note in due course, as between the plaintiff and defendant, had a perfect right to transfer the same without consideration; the plaintiff merely stands in the shoes of the Sovereign Bank of Canada, and the latter concededly came into possession of the note in such a manner as to be relieved of the equities between the maker of the note and McCuaig.

The interlocutory judgment appealed from should be affirmed, with costs.

McLAUGHLIN and SCOTT, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., dissented.

Judgment affirmed, with costs. Order filed.

WILLIAM A. MILLIKEN, Respondent, v. NAPOLEON B. DOTSON,
Appellant.

First Department, February 15, 1907.

Evidence — judicial notice — Federal statute organizing courts of District of Columbia — defective record of judgment of foreign court corrected on appeal.

Although in an action upon a judgment of a foreign court, the record of the judgment was not authenticated in the manner required by the Code of Civil Procedure to be read in evidence, the defect may be remedied by the presentation of a duly authenticated record in the appellate court.

The act of the Congress of the United States (12 U. S. Stat. at Large, 763, chap. 91) organizing the courts of the District of Columbia is a public act of which the courts of this State will take judicial notice, and the same may be read in evidence without the proof required in the case of laws of a foreign jurisdiction. Such act passed under the authorization of subdivision 17 of section 8 of article 1 of the United States Constitution is the supreme law of the land.

(Per LAMBERT and McLAUGHLIN, JJ.): Although it is beyond question that our courts will take judicial notice of said act, when in an action upon a judgment of the Supreme Court of the District of Columbia the record is put in evidence, the jurisdiction of the court is presumed in the absence of proof to the contrary and the plaintiff is entitled to judgment.

APPEAL by the defendant, Napoleon B. Dotson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 19th day of May, 1906, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term, and also from an order bearing date the 21st day of May, 1906, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

R. Burnham Moffat, for the appellant.

Francis I. Osborne, for the respondent.

PATTERSON, P. J.:

On the 10th of November, 1905, this plaintiff recovered a judgment against the defendant herein in the Supreme Court of the District of Columbia, and such judgment remaining wholly unpaid, this action was brought upon it in the month of March, 1906. On the trial of the present action a document purporting to be a duly authenticated copy of the record of the judgment of the Supreme Court of the District of Columbia was offered in evidence, over the objection and exception of the defendant. It was also contended at the trial that the jurisdiction of the Supreme Court of the District of Columbia to render the judgment upon which this action is based was not established. The trial justice directed a verdict for the plaintiff, and from the judgment entered thereon, and from an order denying a motion for a new trial, the defendant appeals.

The only reasons urged upon this appeal for a reversal of the judgment are those presented to and considered by the court below, and which have been hereinabove referred to. That the judgment record was not authenticated in the manner required by the provisions of the Code of Civil Procedure relating to the authentication of records to be read in evidence on the trial of actions in the State of New York was conceded on the argument; but the defect pointed out was remedied, and a duly authenticated record was presented on the argument of the appeal. That an appellate court may allow the production of such a record in support of a judgment is well understood. (*Dunham v. Townshend*, 118 N. Y. 281.) Indeed, that is not controverted by the learned counsel for the appellant here.

The only remaining matter for consideration is the objection

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raised to the jurisdiction of the Supreme Court of the District of Columbia. On the trial the plaintiff appears to have read in evidence certain portions of the act of the Congress of the United States, chapter 91, Acts of 1863 (12 U. S. Stat. at Large, p. 762), entitled "An act to reorganize the Courts in the District of Columbia and for other purposes." It is claimed that this statute was not properly proven. This act of the Congress is one of which courts will take judicial notice. It is a public act. It relates to the establishment of a judicial system for the District of Columbia. It organizes the courts of that district, and the authority of the Congress of the United States to pass it is conferred by the Constitution of the United States, which provides in subdivision 17 of section 8 of article 1 that the Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States." The court will take judicial notice that the District of Columbia is the seat of government of the United States, made so in pursuance of the provision of the Constitution cited. Congress has exclusive authority to legislate in all matters relating to that district, and the Constitution and the acts of the Congress passed in pursuance thereof, and treaties made under the authority of the United States, are the supreme law of the land. The act of Congress of 1863, organizing and establishing the courts of the District of Columbia, is a public act, for the reason that the judicial system of the District of Columbia is part of the organization of the government of that district. The Supreme Court of the District of Columbia, by the 1st section of the act of 1863, has general jurisdiction in law and equity. An act of the Congress establishing such a court, to which all persons may resort who have causes arising or cognizable within the territory of that jurisdiction, is as much a public act as is any statute constituting a department of government. That the jurisdiction may be exercised locally does not detract from the public character of the law establishing the court. We think this statute is one of which the court will take judicial notice.

The judgment and order appealed from should be affirmed, without costs.

HOUGHTON and SCOTT, JJ., concurred.

LAMBERT, J. :

The plaintiff brought this action upon a judgment for \$25,000 alleged in the complaint to have been recovered by plaintiff against the defendant in the Supreme Court of the District of Columbia. Upon the trial defendant moved to dismiss the complaint at the close of the plaintiff's evidence on the ground that it had not been established that the Supreme Court of the District of Columbia had jurisdiction of the person and of the subject-matter. The motion was denied. The defendant offered no evidence, and the court directed a verdict for plaintiff. From the judgment thereupon entered the defendant appeals.

The only question finally submitted to this court was, whether the plaintiff had established the fact of jurisdiction in the court. There is no question as to the jurisdiction of the person; the question, as before suggested, is whether the plaintiff, by introducing in evidence portions of an act of Congress of March 3, 1863 (12 U. S. Stat. at Large, 762, chap. 91) entitled "An act to reorganize the Courts in the District of Columbia and for other purposes," has established the fact that the Supreme Court of the district had jurisdiction of the action in which the plaintiff secured his judgment. There is no doubt, and it is not questioned, that the portions of the act set forth in the record are sufficient to show jurisdiction of the action; but the method of proving the provisions of the statute is questioned, the appellant urging that as the act of Congress is that of a foreign jurisdiction, it must be proved in a manner provided by the laws of New York.

We reach the conclusion that the questions relating to the proof are not material; that the courts of this State may properly take, and it is their duty to take, judicial notice of the jurisdiction of the Supreme Court of the District of Columbia, as provided in the United States statutes. Section 8 of article 1 of the Constitution of the United States provides that "The Congress shall have power: * * * 17. To exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States;" and as

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said by Mr. Chief Justice MARSHALL in *United States v. Bevans* (3 Wheat. 388), "the power of exclusive legislation is jurisdiction." Congress, as the legislative power of "We the people of the United States" (Preamble to the Constitution), is given the exclusive power to make laws respecting the District of Columbia, which has become the seat of the Federal government; and section 2 of article 6 of the Constitution of the United States provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The very first act of every judicial officer in this State is to take an oath to support the Constitution of the United States (U. S. Const. art. 6, § 3; N. Y. Const. art. 13, § 1), and when the Constitution of the United States, as has been seen, gives exclusive legislative power to the Congress in respect to the District of Columbia, and makes the laws which shall be made in pursuance thereof the supreme law of the land, and imposes the duty upon the judges in every State of giving force to them, it is idle to say that we cannot take judicial notice of the enactments made in pursuance of this constitutional power. The legislative power of the nation is concentrated in the District of Columbia; the Congress has all the powers of a State Legislature with reference to the creation of courts within the territory thus set apart as the seat of government. "It is," to quote the language of Judge STORY in *Martin v. Hunter's Lessee* (1 Wheat. 328), "the voice of the whole American people, solemnly declared, in establishing one great department of that government, which was in many respects national, and in all supreme." For the purposes of legislation in reference to the District of Columbia the United States is but a single State, using that word in its broadest sense, as defined in *Talbot v. Silver Bow County* (139 U. S. 438, 444), and the Congress is the legislative power of that State, authorized to enact the "supreme law of the land," which the judges in all the States are bound to know and enforce. It is not merely the supreme law of the District of Columbia; it is the "supreme law of the land," so declared by the Constitution, and it affects more or less every citizen of the United States, in so far as it relates to the creation of

courts at least, for it insures the safety and tranquillity of the seat of the national government, and guarantees to individuals within the District an administration of justice to which all men are entitled. We are all within the jurisdiction of the "supreme law of the land," and we are bound to recognize and apply it whenever it affects the substantial rights of parties before this court. The lower courts of the United States, as well as the Supreme Court on appeal from their decisions, take judicial notice of the Constitution and public laws of each State of the Union without formal proof of the same. (*Mills v. Green*, 159 U. S. 651, 657, and authorities there cited.) In the case cited the court went much further and took judicial notice of political facts within a State. Generally speaking, judicial notice will be taken by all the courts of a State or country of the public statute laws enacted by the law-making body. (17 Am. & Eng. Ency. of Law [2d ed.], 928.) We have shown that under the Constitution the Congress is the exclusive law-making body of the District of Columbia; that it is in the exercise of the sovereign power of the people of the United States in creating a Supreme Court for that District, and it, therefore, cannot be fairly questioned that such an act is a public act, entitling it to such notice. It has been held that it is sufficient if its provisions extend to all persons within described territorial limits, or of a particular locality. (17 Am. & Eng. Ency. of Law [2d ed.], 931; *Burnham v. Webster*, 5 Mass. 266; *Rauch v. Commonwealth*, 78 Penn. St. 493.) It is a public act in its broadest sense, for it relates to the administration of justice in a community in which the people of the United States have a particular interest, and without which there would be no safety to those who are compelled to transact business at the national capital.

But if it were not entirely clear that the court was authorized to take judicial notice of the statute, or of the fact of the existence of the Supreme Court of the District of Columbia, we are of the opinion that the judgment should be affirmed. It is now conceded that there is a properly authenticated certificate of the record of the Supreme Court of the District of Columbia, showing the judgment of that court in favor of the plaintiff. There being a properly authenticated record, this raises the presumption of jurisdiction. (*Buffum v. Stimpson*, 5 Allen, 591, 593; *Bissell v. Wheelock*, 11

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Cush. 277; *Knowles v. Gaslight & Coke Co.*, 19 Wall. 58, 61; *Hanley v. Donoghue*, 116 U. S. 1, 5.) In the case last cited the court says: "Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one State to entitle them to be proved in the courts of another State, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed, unless disproved by extrinsic evidence, or by the record itself."

The District of Columbia, with its national legislative body, is a State within the meaning of the statute providing the means of authenticating records (*Talbott v. Silver Bow County*, 139 U. S. 438, 444), and the plaintiff having placed in evidence the record of the Supreme Court of the District of Columbia, and it appearing upon the face of the record that that court is a court of general jurisdiction, there is a presumption of jurisdiction which the defendant does not meet by proof to the contrary. (*Bissell v. Wheelock*, *supra*, 279.)

Upon the trial the defendant objected to the sufficiency of the proof offered of certification, and took an exception to its admission. That was one of the grounds urged for a reversal. The plaintiff, upon the argument, was permitted to introduce into the record a proper certificate. This was essential to sustain the judgment, and under the circumstances costs and disbursements should not be granted to either party.

The judgment and order appealed from are, therefore, affirmed, without costs.

McLAUGHLIN, J., concurred.

Judgment and order affirmed, without costs. Order filed.

RICHARD F. OUTCAULT, Respondent, v. NEW YORK HERALD COMPANY, Appellant.

First Department, February 8, 1907.

Libel—criticism of newspaper artist—when complaint must show actionable meaning of words by innuendo.

When an artist submits his work to the public no one is answerable for fair comment or criticism thereon.

When a newspaper illustrator who has published a series of comic cartoons known as the "Buster Brown Series" is charged in an article with having run out of ideas, and it is stated in substance that the popularity of the series is waning, etc., the publication is not libelous *per se*, nor does it attack the author in his general capacity or reputation as an artist, and a complaint for libel thereon is subject to demurrer unless the actionable meaning of which the words are capable is pointed out by innuendo.

APPEAL by the defendant, the New York Herald Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of June, 1906, upon the decision of the court rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the complaint made upon the grounds that the complaint fails to state facts sufficient to constitute a cause of action.

Robert W. Candler of counsel [*Jay & Candler*, attorneys], for the appellant.

MacDonald De Witt of counsel [*Arthur A. Brown*, attorney], for the respondent.

CLARKE, J.:

The action is to recover damages for an alleged libel, and is brought by the plaintiff on two alleged causes of action predicated upon two articles published in the *New York Herald*. The complaint alleges that for more than ten years the plaintiff was, and now is an artist and cartoonist of national reputation for ingenuity and skill in his profession, and was and is the originator of the series of comic pictures entitled "Buster Brown and his dog Tige;" that the defendant maliciously composed and published concerning

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the plaintiff in his said profession the following false and defamatory matter, viz.:

"BUSTER BROWN'S CAREER.

"All things have their periods of growth, flower and decay, even the subjects chosen by writers and illustrators contributing to the comic section of the Sunday newspaper.

"Readers of the *Herald's* European edition have been expressing dissatisfaction with recent numbers of the 'Buster Brown' pictures. A letter to the editor — reproduced in a special cable despatch on another page — explains to the grumbling children that Mr. Outcault has evidently 'run out of ideas' and, 'unlike Mr. Gibson, is not willing to attempt something new.'

"The European edition has provided its readers with the new and exceedingly amusing little pet 'Nemo' and other illustrated features for its weekly comic section, and their popularity more than compensates for the waning interest in 'Buster Brown.'"

That the facts stated in said publication were wholly false, and that by reason thereof the plaintiff has been injured in his reputation and in his good name and credit as such artist, to his damage \$50,000.

For the second cause of action, that the defendant maliciously composed and published concerning the plaintiff in his said profession the following false and defamatory matter:

"NEW FEATURES REPLACE BUSTER.

"Sere and yellow leaf period arrives and the *Herald* adopts more amusing pets. Compensate in interest. Letter to European edition says Mr. Outcault has evidently run out of ideas.

"Special Cable to the *Herald*.

Herald Bureau,

No. 49 Avenue De L'Opera,

Paris, Sunday.)

"The *Herald's* European edition publishes the following: Considerable dissatisfaction has been expressed by readers of the European edition with recent numbers of 'Buster Brown.' The following letter, for example, has been received and published:

“HOTEL LORD BYRON,

“No. 16 Rue Lord Byron,

“PARIS, Jan. 10, 1906.

“To the Editor of the *Herald*:

“What is the matter with Buster and Tige, children? I will tell you. Mr. Outcault has evidently run out of ideas and no wonder! But, unlike Mr. Gibson, he is not willing to attempt something new. ‘The Buster and his Bath’ that you saw in the *Herald* last Sunday was one of the first of the Buster Brown series and appeared in the *New York Herald* several years ago when Buster was still somewhat raw and crude. This accounts for the difference that puzzled you.

“GRANNY.’

“Grumblers do not appear to realize that the sere and yellow leaf period must arrive for Buster as well as for all things. The power of the European edition has provided its readers with a new and exceedingly amusing pet, ‘Little Nemo,’ whose popularity here with young and old alike is boundless.

“Indeed, his adventures in Slumberland, the latest cataclysm provoked by Sammy Sneeze, and the agitated existence of those quaint little creatures, the Tiny Teds, form an amazingly popular feature of the weekly comic section of the European edition that more than compensates for the waning interest of Buster’s pranks.”

That the facts stated in said publication were wholly false, and that by reason thereof the plaintiff has been injured in his reputation and in his good name and credit as such artist to his damage of \$50,000.

The defendant demurred to each of the causes of action set forth upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The learned Special Term overruled the demurrer, and from the judgment entered thereon this appeal is taken.

In neither of the alleged causes of action is there an innuendo which explains the meaning of the words complained of, nor is there any allegation by way of innuendo which points to a libelous meaning.

The complaint alleges that the plaintiff is an artist and cartoonist of national reputation for ingenuity and skill in his profession, and was and is the originator of a series of comic pictures and cartoons entitled “Buster Brown and his dog Tige.” It is clear that when

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an artist submits his work to the public such work is subject to criticism, and that no one is answerable for fair comment or criticism thereon. The actor, the artist and the author submit their professional work to the public, and thereby appeal to the public for support and approval. They must accept with equal equanimity, praise and blame so long as the comment is directed at the work itself. (Newell Lib. & Slan. [2d ed.] 566, 567; Townsh. Slan. & Lib. [4th ed.] § 254; Odgers Lib. & Slan. [4th ed.] 202.)

This court said in *Battersby v. Collier* (34 App. Div. 347): "Fair and legitimate criticism is always permitted upon any work of art to which the attention of the public has been invited. * * * However skillful an artist may be, it is not a libel upon him to say that any particular picture of his is not good of its kind. The same rules must be applied to persons in that profession as apply to persons in every other profession; and nothing can be said to be libelous of a man in his profession except something which degrades or lowers him in his professional character generally; and it is not a libel of one in that regard to say that, in any particular work, he has fallen below the proper standard or has made a failure." The Court of Appeals said in *Triggs v. Sun Printing & Publishing Assn.* (179 N. Y. 144): "An author, when he places his work before the public, invites criticism, and however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing and does not go out of his way to attack the author."

The respondent, while admitting the foregoing rule, claims that the articles complained of are not fair criticism of the work of the artist, but are attacks upon him personally, and come within the rule stated in the *Triggs Case* (*supra*): "If, under the pretext of criticizing a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel."

Respondent claims that the publication complained of falsely states the following material facts, viz.: (1) That the *Herald's* readers have been expressing dissatisfaction with plaintiff's drawings; (2) that plaintiff had run out of ideas and was unwilling to attempt something new; (3) that the Buster Brown drawings had reached the sere and yellow leaf period, *i. e.*, that they were no

longer meritorious or popular, and (4) that the *Herald* had substituted therefor a more popular series of drawings. This does not seem to be the obvious and necessary interpretation of the words complained of. They are, in our opinion, susceptible of interpretation as criticism of the particular work known as the Buster Brown series of pictures. Where an artist has been for a long time engaged in the production of a particular kind of work criticism of that work upon the ground of sameness can hardly be said to be libelous *per se*. The articles, to our minds, are confined to a criticism of this series of productions and did not attack their author in his general capacity or reputation as an artist. The severest part of the publication is perhaps the following: "What is the matter with Buster and Tige, children? I will tell you. Mr. Outcault has evidently run out of ideas and no wonder! But, unlike Mr. Gibson, he is not willing to attempt something new."

That paragraph is certainly susceptible of the interpretation that it was in respect to the Buster Brown series that the plaintiff had run out of ideas. That is to say in regard to the particular work which he was submitting to the public, and so far from a suggestion that he had run out of all ideas as an artist it is negatived by the statement that it was no wonder he had in regard to the particular work by reason of his long continuance therein, but that he had only to turn to a new line of work, if willing to do so, to achieve renewed success.

We are called upon, therefore, to apply the rule that where the words complained of are capable of two meanings, one defamatory and the other not, the question as to the sense in which they are used can only be submitted to the jury when there is a proper innuendo pointing to an actionable meaning of which the words are capable. "It is * * * well settled that where * * * the language is capable of being construed in an innocent and harmless, as well as an injurious sense, an innuendo to point out the meaning which the plaintiff claims to be the true meaning and the one upon which he relies to sustain his action, is necessary to the sufficiency of the statement of a cause of action." (*Beecher v. Press Publishing Co.*, 60 App. Div. 536.)

The same rule is laid down in actions for slander. (*Hemmens v. Nelson*, 138 N. Y. 517, 531.)

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As the words complained of are susceptible of the interpretation as criticisms of the artist's work and, therefore, not libelous *per se*, the complaint fails to state a cause of action by not containing an innuendo pointing out the particular meaning which the plaintiff now seeks to ascribe thereto.

The judgment overruling the demurrer should, therefore, be reversed, with costs, and the demurrer sustained, with costs to the appellant, with leave to the respondent, however, within twenty days upon payment of such costs to serve an amended complaint.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, J.J., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to amend on payment of said costs. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FERDINAND MUNCH BREWERY, Respondent, v. MAYNARD N. CLEMENT, as State Commissioner of Excise of the State of New York, Appellant.

First Department, February 8, 1907.

Intoxicating liquors — conditions precedent to rebate on surrendered certificate — mandamus — answer raising questions of fact — peremptory writ denied.

To entitle the holder of a liquor tax certificate to a rebate on surrendering the same under section 25 of the Liquor Tax Law the burden is upon the holder of the certificate to establish as a condition precedent to the right to rebate (1) that there is no complaint, prosecution or action pending on account of a violation of the Liquor Tax Law; (2) that the person surrendering has not violated any provision of the law during the excise year for which the certificate was issued; (3) that the certificate was surrendered before arrest or indictment for a violation of the law; (4) that the person surrendering has ceased to traffic in liquors during the term for which the tax was paid.

Where the petition on mandamus to compel the Commissioner of Excise to pay the rebate admits that an agent or employee of the owner was arrested and convicted for illegally selling liquor on Sunday, and the answer denies the conditions precedent aforesaid alleged by the petition, and affirmatively sets out that the holder personally and by her agents and servants sold liquor on Sunday, etc., an issue of fact is raised and the relator is entitled only to an alternative writ; the granting of a peremptory writ is improper.

APPEAL by the defendant, Maynard N. Clement, as Commissioner, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of December, 1906, granting a peremptory writ of mandamus commanding him to prepare and execute orders for the payment of a rebate, upon the surrender of a certain liquor tax certificate.

Herbert H. Kellogg, for the appellant.

Victor E. Whitlock of counsel [*Holm, Smith, Whitlock & Scarff*], for the respondent.

CLARKE, J. :

It appeared from the petition that the relator, the Ferdinand Munch Brewery, brought this proceeding as the assignee and attorney in fact of Rosa Tubbiolo, to whom a liquor tax certificate issued to Frances Gagliano had been transferred, to obtain a mandamus directing the State Commissioner of Excise to prepare and issue two orders for the payment of the rebate claimed to be due upon said liquor tax certificate which had been surrendered. After setting up the formal facts, about which there is no dispute, showing that the amount of the rebate for the unexpired term had been duly computed at the sum of \$485, the petition alleged in paragraph 11, "Upon information and belief that at the time of the surrender of said liquor tax certificate, no complaint, prosecution or action was pending on account of any violations thereof against the aforesaid Frances Gagliano or Rosa Tubbiolo, or your petitioner, the persons holding the said certificate, or who have held the said certificate, nor was any complaint, prosecution or action pending on account of any violations of the Liquor Tax Law, and that neither said Frances Gagliano nor Rosa Tubbiolo had been arrested nor indicted for any violation of the Liquor Tax Law; and that no one of the aforesaid holders of the said certificate has violated any provision of the Liquor Tax Law during the excise year for which such certificate was issued; except, however, that on or about the 10th day of September, 1905, one Bruschi Natale, an agent and employee of the aforesaid Rosa Tubbiolo, who was at that time the holder of the aforesaid certificate, was

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arrested for a violation of the Liquor Tax Law, charged with selling liquors on a Sunday, in violation of the statute, and was thereafter duly tried and convicted of said offense in the Court of Special Sessions of the Borough of Manhattan, City of New York, and sentence was suspended; and, upon information and belief, that there has been no other violation or conviction of any agent or employee of the holder of said certificate."

The answer puts in issue the following material allegations of the petition: The Commissioner denies knowledge or information sufficient to form a belief as to whether or not, prior to the 1st day of December, 1905, Frances Gagliano and Rosa Tubbiolo and all persons under either of them, voluntarily ceased to traffic in liquors during the term for which the tax was paid under the said certificate. He denies the allegations contained in paragraph 11 of the petition: "That at the time of the surrender of said liquor tax certificate no complaint, prosecution or action was pending on account of any violations thereof against the aforesaid Frances Gagliano or Rosa Tubbiolo, or your petitioner, the persons holding the said certificate, or who have held the said certificate, nor was any complaint, prosecution or action pending on account of any violations of the Liquor Tax Law," and denies specifically that no one of the aforesaid holders of the certificate has violated any provision of the Liquor Tax Law during the excise year for which said certificate was issued. The answer admits the allegations in the 11th paragraph as to the conviction of Natale, the agent and employee of Tubbiolo, and denies any knowledge or information sufficient to form a belief as to whether there has been any other violation, or any other conviction of any agent or employee of the holder of said certificate. For a further separate and affirmative defense, the Commissioner affirmatively alleges that on Sunday, the 10th of September, 1905, and during the excise year for which said certificate was issued, the said Rosa Tubbiolo, then the holder of said liquor tax certificate, personally and by her agents, servants, bartenders and persons in charge of said premises at the place designated in said liquor tax certificate as the place in which traffic in liquor was to be carried on thereunder, namely, 316 East Thirty-ninth street, borough of Manhattan, New York city, did wrongfully and unlawfully traffic in liquor by selling to William H. Lott one glass of lager beer, to be and which was

drunk in the premises by said William H. Lott. He further sets forth the conviction of Natale and attaches an extract of the minutes of the Court of Special Sessions showing said conviction, and the affidavit of William H. Lott, the complaining witness, upon said prosecution.

Section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1903, chap. 486) provides as follows: "If a person holding a liquor tax certificate and authorized to sell liquors under the provisions of this act, against whom no complaint, prosecution or action is pending on account of any violation thereof, and who shall not have violated any provision of the Liquor Tax Law during the excise year for which such certificate was issued, shall voluntarily, and before arrest or indictment for a violation of the Liquor Tax Law, cease to traffic in liquors during the term for which the tax is paid under such certificate, such person or his duly authorized attorney may surrender such tax certificate," provided, that such certificate shall have at least one month to run, and shall receive a rebate therefor, except as therein provided. This right to a rebate is to be construed as resting upon a contract between the licensee and the State. (*People ex rel. Stevenson Co. v. Lyman*, 67 App. Div. 451.)

To entitle the holder to the rebate there are certain conditions precedent, the fulfillment of which must be completed at the time of the surrender, and being conditions precedent their fulfillment must be alleged and the burden of establishing them is upon the certificate holder. These conditions are as follows: *First*, there must be no complaint, prosecution or action pending on account of a violation of the Liquor Tax Law; *second*, the person surrendering must not have violated any provision of the Liquor Tax Law during the excise year for which this certificate was issued; *third*, the certificate must be surrendered before arrest or indictment for a violation of the Liquor Tax Law; *fourth*, the person surrendering must have ceased to traffic in liquors during the term for which the tax was paid.

As to the first of these conditions, the Court of Appeals said in *People ex rel. Frank Brewery v. Cullinan* (168 N. Y. 258): "Upon a careful consideration of the provisions of this statute, it is apparent that the conditions imposed are conditions precedent and that the

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property right in the rebate does not attach if there is an arrest or indictment or other prosecution provided for in the statute pending at the time of the surrender or within thirty days thereafter. In this case Anderman was under arrest charged with a violation of the Excise Law, at the time that his certificate was surrendered and consequently was not in a position in which he could make a surrender and become entitled to the rebate. * * * The Frank Brewery, being the assignee and acting as agent of Anderman, stands in his shoes and has no greater rights to the rebate than he would have had had he surrendered the certificate in person."

The fourth one of these conditions was considered in *People ex rel. Stevenson Co. v. Lyman (Michels Certificate)* (67 App. Div. 446; affd., 173 N. Y. 605) and *People ex rel. Stevenson Co. v. Lyman (Barry Certificate)* (69 App. Div. 406; affd., 173 N. Y. 604). In both proceedings the relator insisted that he was entitled to a writ of mandamus without having shown that the certificate holders had ceased to traffic in liquor. In the *Michels* case VAN BRUNT, P. J., said: "The right of the relator to the rebate having been denied by the return it was bound to show proof or admissions upon the record that the holder of the liquor license and his attorney had done all that the law required as conditions precedent to the right to claim such rebate. * * * He must, prior to such tender of surrender, voluntarily have ceased to traffic in liquors. * * * It seems to me that the right to the rebate is to be construed as resting upon a contract between the licensee and the State. If such is the case, clearly the party claiming must show compliance with all conditions precedent. * * * Upon whom does the burden of proof lie? Clearly the claimant must prove his case as in the case of any other contract." The *Barry* case followed the *Michels* case and was to the same effect.

The amendment of 1903 (*supra*) inserted in section 25 (as amd. by Laws of 1897, chap. 312, Laws of 1900, chap. 367, and Laws of 1903, chap. 115) the additional condition precedent, "and who shall not have violated any provision of the Liquor Tax Law during the excise year for which such certificate was issued."

It is evident that the same rule must be laid down as to this condition precedent as has already been asserted in regard to the two others, as pointed out, and this was distinctly held in this depart-

ment in *People ex rel. Hupfel's Sons v. Cullinan* (95 App. Div. 598), Mr. Justice HATCH saying: "The right to the rebate is not dependent upon the non-existence of an indictment, complaint, prosecution, action or other proceeding for a violation of the Liquor Tax Law at the time that the surrender is made. On the contrary, by the express provisions of the statute, such condition must not only exist at the time of the surrender, but it is also required that the holder 'shall not have violated any provision of the Liquor Tax Law during the excise year for which such certificate was issued.' By the terms of the statute, therefore, it is made a condition precedent that there shall have been no violation of the Liquor Tax Law during the excise year for which the certificate was issued, and that there have been no violations prior to the time when the holder ceases to traffic in liquor. * * * Therefore, it devolved upon the relator to establish, as a condition precedent, that he had made compliance with the Liquor Tax Law, and as this is necessarily dependent upon the proof which he is able to make, it follows that a peremptory writ of mandamus could not issue in the face of the issues thus raised."

In the case just cited the record discloses a petition and an answer similar to the one at bar with one notable exception. In the *Hupfel's Sons* case the petition asserted that there had been no violation. The answer set up one conviction by an employee and attached the extract from the minutes, and the affidavit of the complaining witness in that proceeding, precisely as in the case at bar. The petition in the case at bar itself asserts one conviction by an employee, and, therefore, a much stronger case was presented for the refusal of a peremptory writ of mandamus than in the case last cited. The denials in the answer to the petition raised distinct issues of fact as to violations by the holders of the certificate personally, and, therefore, in this case the granting of a peremptory writ was error. A question was raised upon the argument that inasmuch as the petition itself disclosed a violation in that there had been a conviction of an employee of the certificate holder, even the issuance of an alternative writ should be improper.

The appellant argues that as this court held in the *Hupfel's Sons* case that an allegation in the answer of one conviction by an employee raised an issue of fact as to whether there had been a

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violation by the certificate holder, which required a trial upon an alternative writ, it necessarily followed that if the one conviction of the employee was established upon the trial the violation by the certificate holder was made out, and there could be no rebate under section 25 of the Liquor Tax Law as amended by chapter 486 of the Laws of 1903, notwithstanding the provisions of subdivision 3 of section 34 thereof (as amd. by Laws of 1897, chap. 312), which provides that "If there shall be two convictions of clerks, agents, employes, or servants of a holder of a liquor tax certificate for a violation of any provision of this act the liquor tax certificate of the principal shall be forfeited and the said principal shall be deprived of all rights and privileges thereunder, and of any right to any rebate of any portion of the tax paid thereon * * *."

This raises an interesting question which, however, upon this record, we do not believe to be before us because it does not appear in the record that any motion to dismiss or quash the proceedings on that ground was made in the court below, and inasmuch as under these papers other violations than the one alluded to might be proved, the decision of this question at the present time would be improper. We, therefore, reserve judgment upon the point suggested, as not in the record.

The order appealed from granting a peremptory writ should be reversed, with fifty dollars costs and disbursements, and an alternative writ granted.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with fifty dollars costs and disbursements, and alternative writ granted. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. E.
BURTON ALLCUTT, Appellant.

First Department, February 8, 1907.

**Crime — practicing medicine without right — practicing medicine
defined.**

Practicing medicine within the meaning of section 153 of the Public Health Law, prohibiting such practice without lawful registration, does not consist in merely administering drugs or the use of surgical instruments, but the term includes broadly the making of diagnosis and other recognized practice of physicians.

Hence, one not licensed to practice, who advertises himself as a doctor practicing mechano neural therapy, who takes patients, makes diagnosis and prescribes diet and conduct, and who asserts the power to "cure all diseases that any physician can cure without drugs, and also diseases that they cannot cure with drugs," and takes payment for consultations and treatment, is properly convicted of a violation of the statute, although he administers no medicines.

APPEAL by the defendant, E. Burton Allcutt, from a judgment of the Court of Special Sessions of the city of New York, First Division, rendered on the 4th day of January, 1906, convicting him of the crime of practicing medicine without being lawfully authorized and registered, in violation of section 153 of chapter 661 of the Laws of 1893, as amended by chapter 398 of the Laws of 1895.

Terence J. McManus of counsel [*Black, Olcott, Gruber & Bonynges*, attorneys], for the appellant.

Robert C. Taylor of counsel [*William Travers Jerome, District Attorney*], for the respondent.

CLARKE, J.:

The evidence tended to establish that in the window of the defendant's residence was exhibited a sign, "Dr. E. Burton Allcutt, Mechano Neural Therapy;" that on the bell outside the door was the name "Dr. Allcutt;" that in the office building on Twenty-second street in which the defendant had an office there appeared upon the directory in the hall, "Dr. E. Burton Allcutt;" that he had and distributed a card reading, "Phone 3192 Riverside, Dr. E. Burton Allcutt, Mechano Neural Therapy, 27 East 22nd Street,

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room 55, Office hours 9 to 12 A. M. 336 West 95th Street, Office Hours, 2 to 6 P. M., New York City." That his receipt for services rendered was signed "Dr. E. Burton Allcutt;" that the complaining witness visited the defendant at the office address given; that defendant said that he was Dr. Allcutt; "I usually see all my patients uptown in the afternoon and I am down in this office in the morning." That the witness having said that she was troubled with severe headaches, was nervous and had frequent spells of vomiting, the defendant told her he wished her to remove her corsets in order to examine her thoroughly to find out what her trouble was; he examined her chest, heart and back by placing his ear to her heart; he tapped with his fingers; that the witness said, "Doctor, I have also a very severe pain in my left arm, do you think it is rheumatism?" He said, "You are entirely too young to have rheumatism; it is from your stomach; you have malaria and stomach disease." She said to him, "Can you cure me?" The defendant said, "Certainly I can. You will have to take twelve treatments" which will cost \$25 in advance; that he said he gave no medicine at all but quieted the nervous system. That the defendant was asked if he called at patients' residences; that he replied, "Certainly. As she resides in the Bronx I would have to charge her \$5 a visit." Witness said, "Doctor, can you cure all diseases without drugs?" He said, "Yes, I find I can cure without drugs, I can cure all diseases that any physician can cure without drugs, and also diseases that they cannot cure with drugs." He said that he had practiced medicine; that he had given up drugs; that he could cure anything that physicians cured; and that she then paid five dollars for the examination and received a receipt; that subsequently the defendant called at her residence in response to a telephone call; that witness told him that she felt ill all day, that she had a chill and had been vomiting, had a pain in the region of her abdomen; that defendant took hold of her hand, felt of her pulse, looked at her tongue, examined her throat and said: "It is all from your stomach. * * * I want you to drink a quantity of lukewarm water with salt in it." He gave it to her in spoonfuls. He said, "You must not eat pork or potatoes or any kind of sweets," and then said, "I will give you a treatment." Witness testified that defendant started to treat her back with his fingers

he said he was treating her nerves; he treated her spine by putting the fingers upon her spine, the ends of the fingers, a touching sensation, nothing like kneading; he did this for about an hour. He varied that treatment, on the neck, breast, heart and stomach in the same way, just by his fingers. He advised her, in case she had pains in the night, if the pain in her abdomen were severe, to place an ice bag on it and one on her feet, and if her bowels troubled her to place a hot water bag on her back and go to bed, not to lie on the couch, and if she got any worse to send for him. That her husband said to him, "Doctor, what are you doing?" He replied, "I am treating her nerves. Don't you see how quiet she is now?" and that five dollars was paid for that visit. The witness testified that as a matter of fact there was nothing the matter with her, and that she was acting during these interviews as a detective.

The defendant in his own behalf testified that he practiced the art of mechano neural therapy and that he was a graduate of the college of Mechano Neural Therapy of Atlantic City, N. J., having received its diploma on the 1st of November, 1902. It was conceded that the College of Mechano Neural Therapy was not recognized by the Regents of the State of New York and that a diploma of that institution will not give the right to practice nor to an admittance to an examination to determine the fitness of such a person to practice medicine, and that defendant was not registered as a physician in the county of New York. The defendant testified: "I started into the practice of this profession on the 11th of November, 1902, at the present address. I have practiced ever since in the city of New York and elsewhere;" that prior to his attendance at said college he had been practicing massage, and was a graduate of the Mills Training School, attached to Bellevue Hospital, and had engaged in his profession as a nurse; that the statement of the complaining witness was substantially correct; that he had not studied medicine, except from the standpoint of a nurse; that mechano neural therapy means mechanical nerve treatment, a gentle pressure on all parts of the body; that the whole theory of this science is that disease comes from the lack of blood circulation, and that the treatment proceeds upon the theory of assisting the circulation back into the normal condition.

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The defendant was convicted of the crime of practicing medicine without being lawfully authorized and registered.

The contention of the appellant is that, conceding all the facts proved, he was not guilty of the crime charged, inasmuch as he was not practicing medicine within the meaning of the statute, in that he neither gave nor applied drugs or medicines nor used surgical instruments. Section 153 of the Public Health Law (Laws of 1893, chap. 661, as amd. by Laws of 1895, chap. 398) provides as follows: "Any person who, not being then lawfully authorized to practice medicine within this State and so registered according to law, shall practice medicine within this State without lawful registration * * * shall be guilty of a misdemeanor."

To confine the definition of the words "practice medicine" to the mere administration of drugs or the use of surgical instruments would be to eliminate the very cornerstone of successful medical practice, namely, the diagnosis. It would rule out of the profession those great physicians whose work is confined to consultation, the diagnosticians, who leave to others the details of practice. Section 140 of the Public Health Law provides that "no person shall practice medicine * * * unless licensed by the Regents and registered," and section 146 of said statute (as amd. by Laws of 1901, chap. 646), provides that the Regents' examinations must be made up of "suitable questions for thorough examinations in anatomy, physiology and hygiene, chemistry, surgery, obstetrics, pathology and *diagnosis*, and therapeutics, including practice and materia medica." Diagnosis would, therefore, seem to be an integral part of both the study and practice of medicine, so recognized by the law as well as common sense. The correct determination of what the trouble is must be the first step for the cure thereof. It is a well-known fact that the disease popularly known as consumption may, if discovered in time, be arrested, if not entirely eradicated from the system, by open air treatment in the proper climate, and that in such cases use of drugs has been practically given up. Would the physician, in such a case, who, by his skill, discovered the incipient disease, advised the open air treatment and refrained from administering drugs not be practicing medicine? It may be difficult, by a precise definition, to draw the line between where nursing ends and the practice of medicine begins, and the court should not attempt, in

construing this statute, to lay down in any case a hard and fast rule upon the subject, as the courts have never undertaken to mark the limits of the police power of the State or to have precisely defined what constitutes fraud. What the courts have done is to say that given legislation was or was not within the limits of the police power, or that certain actions were or were not fraudulent.

The appellant relies upon the case of *Smith v. Lane* (24 Hun, 632, decided by the General Term in May, 1881). That case was an action brought to recover the price which, it was alleged, the defendant agreed to pay the plaintiff for the treatment of himself and his wife for certain bodily disabilities. It consisted entirely of manipulation with the hands; it was performed by rubbing, kneading and pressure. The evidence given by the plaintiff was to the effect that he was employed by the defendant to perform these services for a specific consideration, and that he had performed them until the amount due to him was the sum of \$149. The referee dismissed the complaint because it appeared that the plaintiff was not a graduate of any medical school and had no license permitting him to practice either medicine or surgery. Mr. Justice DANIELS, in writing for a reversal of this judgment, said: "The act did not in terms prohibit any person from following an occupation of this description, and without some prohibition, it would seem to be as lawful as any other in which one person might render services at the request of and for the benefit of another. * * * The practice of medicine is a pursuit very generally known and understood, and so also is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances. * * * What he did in no just sense either constituted the practice of medicine or surgery. He neither gave nor applied drugs or medicine nor used surgical instruments. He was outside of the limits of both professions, and neither one of the schools or societies mentioned in the act had jurisdiction over him or could have intervened to authorize, restrict or prevent him in the occupation he was engaged in following. While his services may have afforded no benefit to the persons receiving them, he was not prohibited from performing them by anything in

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this act, and no other law was violated by the contract which the evidence tended to show had been entered into." It will be noted that that was a private action between the parties to a contract for services rendered, and that the people were not represented.

We do not consider the remarks of the learned judge, above quoted, as being an exhaustive or exclusive definition of the term "practice of medicine." In the same volume in which *Smith v. Lane* was reported appears the case of *Grattan v. Metropolitan Life Ins. Co.* (24 Hun, 43), where the question of the admissibility of the evidence of a physician under section 834 of the Code of Civil Procedure was under consideration. The physician did not prescribe, but took a sufficient diagnosis to enable him to prescribe. His evidence having been admitted over objection, LEARNED, P. J., in writing for reversal, said: "The defendant insists that there was no relation of physician and patient * * * because Grattan did not consult him as to a prescription and the doctor did not prescribe. *But the day has passed when it was thought that a physician's advice was of no use unless he ordered a dose of medicine.* * * * Next, the defendant insists that the doctor did not act in a professional capacity because he gave no prescription and no advice. But it is plain enough that there are cases where a physician on examining a patient, sees that medicine will do no good, and that there is no advice to give, except just what the doctor gave to Grattan to make the best of the present, because he would not remain here very long."

The appellant cites five cases in other States as in harmony with *Smith v. Lane* (*supra*). *State v. Liffing* (61 Ohio St. 39) was under the peculiar language of the statutory definition which was held to require the use of drugs in order to constitute the practice of medicine. There was subsequently an amendment of the Ohio statute, and the subsequent cases of *State v. Gravett* (65 Ohio St. 289) and *State v. Murble* (72 id. 21) were decided the other way. *State v. Herring* (70 N. J. L. 34) was also decided upon the wording of the statute. *Nelson v. State Board of Health* (108 Ky. 769; 57 S. W. Rep. 501) and *State v. McKnight* (131 N. C. 717) are not entitled to be considered authorities in this jurisdiction, inasmuch as they proceed upon the proposition that in those States it would be unconstitutional for the Legislature to limit the right to practice

medicine, a doctrine counter to that held in the rest of the Union. There remains but one case, that of *State v. Mylod* (20 R. I. 632), a case of a Christian Scientist. The court pointed out that the defendant not only did not attempt to treat disease, but he denied its very existence. In contrast with this last case is *People v. Pierson* (176 N. Y. 201). Pierson believed in "Divine healing." His child had catarrhal pneumonia and died. Pierson did not call in a physician, but believed the child could be cured by prayer. He was convicted under section 288 of the Penal Code for willfully omitting to furnish "medical attendance" to the child. Judge HAIGHT concludes that the medical attendance required by the provision of the Penal Code could be furnished only by a physician duly authorized to practice under the Public Health Law, and the conviction was sustained.

As opposed to the cases following *Smith v. Lane*, the courts of Massachusetts, Maine, Michigan, Iowa, Missouri, Colorado, Nebraska, Illinois, Ohio, Alabama, Indiana, New Mexico, South Dakota and Tennessee refuse to restrict the "practice of medicine" to the administration of drugs or the use of surgical instruments.

In *Bragg v. State* (134 Ala. 165), decided at the November term, 1901, upon the provisions of the Civil Code of that State (§§ 3261-3266) and of the Criminal Code (§ 5333), in effect identical in language with the provisions of the statutes of this State, the court in a most exhaustive and instructive opinion declared that both the man who used and the man who did not use drugs were yet engaged in the art of healing and curing human diseases; that the purpose of the medical law was to protect the public against charlatanism, ignorance and quackery, and that it was not the legislative intent to restrict the examination of those desiring to practice medicine to that class of the profession who may prescribe drugs. In that case and in the note to *O'Neill v. State* (3 L. R. A. [N. S.] 762; 115 Tenn. 427) may be found collected the cases in the several States as indicated *supra*, which did not follow the definition of practice of medicine as limited and restricted in *Smith v. Lane*.

We are of the opinion, from the general current of the authorities throughout the country and from examination of the history and growth of our own public health statutes, that we should not apply the rule as claimed to have been laid down in *Smith v.*

Lane. When we find, as in this case, a defendant holding himself out by sign and card as a doctor, with office hours, who talks of his patients and gives treatments, who makes a diagnosis and prescribes diet and conduct and remedies, simple though they be, and who asserts the power to cure all diseases that any physician can cure without drugs and also diseases that they cannot cure with drugs, and who takes payment for a consultation wherein there was an examination and determination of the trouble, that is, a diagnosis, as well as payment for subsequent treatment, even if no drugs are administered, we must hold that he comes within the purview of the statute prohibiting the practice of medicine without being lawfully authorized and registered.

The judgment of conviction should, therefore, be affirmed.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Judgment affirmed. Order filed.

In the Matter of the Application of the CITY OF NEW YORK, Respondent, Relative to Acquiring Right and Title to the Wharfage Rights, etc., to Piers Old Nos. 19 and 20, East River, in the Borough of Manhattan, etc.

ELBRIDGE T. GERRY and Others, Appellants.

First Department, February 8, 1907.

Eminent domain — acquisition of piers by city of New York — compensation for “shedding license” taken.

When a pier owned partly by the city of New York and partly by private owners is taken by eminent domain and the private owners have a license from the city to erect and maintain a shed upon said pier, the “shedding” right is an incorporeal hereditament enhancing the value of the property and cannot be taken without due compensation. This is true, although the license to build the shed provides that the manner of construction is subject to regulation by the police power and reserves a right to require changes and additions. Although the right to build a shed was originally given in 1873, which right, though unauthorized, was confirmed by chapter 249 of the Laws of 1875, the property right therein is not lost by reason of the fact that the shed has

been partially destroyed by fire, and the owner of that right is entitled to compensation therefor when the pier is taken by eminent domain. But when a pier having no present shedding right appurtenant thereto is taken, the owner is not entitled to compensation for the possibility that such permit might be granted in the future.

APPEAL by Elbridge T. Gerry and others from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of July, 1906, overruling objections to the confirmation of the corrected report of the commissioners of estimate and assessment in condemnation proceedings, and also from an intermediate order entered in said clerk's office on the 16th day of May, 1906, sustaining the objections of the city of New York to the confirmation of the original report of said commissioners.

William H. Harris, for the appellants.

Theodore Connolly, *Charles D. Olendorf* with him on the brief [*William B. Ellison*, *Corporation Counsel*], for the respondent.

CLARKE, J. :

This proceeding was brought by the city of New York through the commissioner of docks to acquire the interests not owned by the city in pier old No. 19 and pier old No. 20, East river, and the bulkhead rights appurtenant to the bulkhead between said piers. While the rights of the city and the claimants to the piers in question were undivided, yet said piers were, by practical construction, divided between the city and the claimants, so that the city was treated as the owner of the westerly half of pier old No. 19, and the easterly half of pier old No. 20, the other halves of the two piers being treated as in the ownership of the claimants.

Pier old No. 19 was located at the foot of Fletcher street, extending from South street into the East river about 441 feet. It had no shed on it and never had been shedded. Pier old No. 20 was located at the foot of Burling slip, extending from South street into the East river about 417 feet.

On July 3, 1873, a resolution was adopted by the department of docks, acting upon the request of C. H. Mallory & Co., who were then and still were at the commencement of the present proceeding, lessees of the pier old No. 20, under the name of the New York and Texas

Steamship Company, for permission to shed the pier as follows: "Resolved, that the portion of pier 20, East River, belonging to the city, be leased to C. H. Mallory & Co. for the term of five years; * * * and further that permission be granted to said lessees (provided they obtain and file in the Department the written consent of the owners of the west half of the pier) to erect a shed on the pier, the same to be built in accordance with the fire laws of the city, and under the supervision of Superintendent Turner; said lease to contain a covenant that in case the pier shall be required before the expiration of the above term, for making the contemplated bulkhead extension, the same shall be surrendered by the lessees upon three (3) months' notice from this Department, without any claim for damages against the city." The necessary consent was given by the lessees and the pier was thereafter shedded. The shed then built remained until the year 1900, when in the month of May it was burned down with the exception of some thirty feet at the end of the pier.

It is not disputed that the shed erected in 1873 under this permission was when built absolutely illegal. *People v. Mallory* (46 How. Pr. 281) decided this point in regard to this very pier. Thereafter there was passed the statute known as the "Shedding Act," chapter 249 of the Laws of 1875, which provided among other things as follows: "SECTION 1. Whenever any person, company or corporation engaged in the business of steam transportation shall be the owner or lessee of any pier or bulk-head in the city of New York, and shall use and employ the same for the purpose of regularly receiving and discharging cargo thereat, it shall be lawful for such owner or for such lessee, with the consent of the lessor, to erect and maintain upon such pier or bulk-head, sheds for the protection of property so received or discharged, provided they shall have obtained from the department of docks in said city a license or authority to erect or maintain the same, and subject to the conditions and restrictions contained in such license or authority. All sheds or structures heretofore erected or maintained upon any wharf or pier in the city of New York under any license or permit granted by the department of docks in said city are hereby declared to be lawful structures subject to the terms and conditions of the license or permit authorizing the same. Such sheds shall be constructed

subject to the regulations and under the authority of the superintendent of buildings and the department of docks." The effect of this statute has been considered by this court in *Matter of City of New York, Pier No. 15* (95 App. Div. 501; 113 id. 903; affd., 185 N. Y. 607). Mr. Justice INGRAHAM said in regard to a shed which had been erected under a license before the act of 1875 had been passed, in construing the effect of said act upon the rights of owners: "There being no authority given to the dock department to revoke such license or authority when once given, when that authority was given the structure became by the force of the legislative enactment a lawful structure. It seems to me that the public authorities had no power to revoke the authority to erect a shed, and when the city attempted to condemn it in this proceeding they were bound to pay to the appellants the value of the pier with this right to shed the pier as an appurtenance to it. The department of docks have never attempted to revoke this authority or to make this shed an illegal structure. When the city of New York, exercising the power of eminent domain, commenced this proceeding to acquire title to the property, it was a property upon which these appellants were entitled to maintain this structure; and it was the value of that pier, with the right to maintain this structure * * * to which these appellants were entitled."

It, therefore, follows that if the situation in the case at bar is the same as that which was presented to the court in the case just cited, it would be governed by that controlling decision.

The learned corporation counsel attempts to differentiate, *first*, by claiming that the original permission to shed given by the resolution of the dock department in 1873 was by its terms a limited permit which might be terminated in three months and whose life was at best five years. He claims that this clause, "said lease to contain a covenant that in case the pier shall be required before the expiration of the above term, for making the contemplated bulkhead extension, the same shall be surrendered by the lessees upon three (3) months' notice from this Department, without any claim for damages against the city," sustains his contention. We do not so interpret the paper. The resolution provided for a lease of the portion of the pier 20 belonging to the city for the term of five years and the clause alluded to had to do solely with the right of

the city to cancel its lease for the city's half of the pier within three months without any claim for damages against the city for the cancellation of that lease. That provision could not be read into the rights of the owners of the half of the pier not belonging to the city nor could the provision palpably relating to the lease be made to apply to the entirely independent provision giving permission to shed the whole pier, the only proviso as to that being that the lessees should obtain the consent of the owners of the other half of the pier and that the shed, when built, should be built in accordance with the fire laws of the city.

So far, then, as the first point is concerned, we construe this permit to shed as having been of the same character as that passed upon in *Matter of City of New York, Pier No. 15 (supra)*.

The second point made is that the act of 1875, by the use of the language "all sheds or structures heretofore erected or maintained," confined the legalization of the sheds to those actually in existence at the time of the passage of the act, and that the shed which was then in existence and was so legalized having been destroyed by fire in 1900, the license or permit to shed, which would otherwise have been irrevocable by the city under the *Pier No. 15* case, was nevertheless revoked by fire. It is claimed that this was the construction put upon the situation by the owners and that they must be bound thereby. It appears that after the fire Mallory & Co. applied to the commissioners of the dock department for permission to shed part of the pier 20 in accordance with plans submitted, and that the owners joined in the application of C. H. Mallory & Co. "for permission to erect temporary shed upon said pier as per plans to meet your approval," and that the dock department granted a permit thereon as appears by the following minute: "From the President. 1st. Recommending that a temporary permit be granted C. H. Mallory & Co. to shed a portion of Pier 20, East River, in accordance with plans submitted as amended, the shed to be erected under the direction and supervision of the Engineer-in-chief of this Department and to remain thereat only during the pleasure of the Board. Recommendation adopted." And it appears that the shed which was thereafter erected was erected in sections of sixty feet, with open spaces of twenty feet, between the sections which were subsequently filled by iron material.

obtained from another burned pier and was correctly described in the evidence as a temporary or patched-up affair.

While the facts are conceded we do not agree with the inference sought to be drawn. We take it that there are two separate things involved in the permit, *first*, the right to shed, and, *second*, the kind of shed to be erected. The first may be considered as in the nature of an incorporeal hereditament, a valuable right adding greatly to the value of the property, and when once given by the city conferring a property right irrevocable by it and not to be taken without due compensation. The second a control of the character of the shed, its construction and material subject to the police powers which, when necessity arises, may be applied. The right of an owner of land to build upon his property is subject to the regulation by the police power of the manner of construction and of the material used, and the right to require changes and additions to constructed buildings under said power has many times been applied and sustained by the courts.

If the right to shed obtained by the granting of the first permit, as subsequently legalized by the Legislature, should be confined to the structure then in existence, how much of a change in the building due to wear and tear, the actions of the elements, accident or disaster, would destroy that valuable property right? It cannot be that such a right, held to be irrevocable by direct action of the city, would be subject to such chance or change. A portion of the original structure was still in existence when this proceeding was instituted. Is that portion of the pier to be considered as possessing the irrevocable right to be shedded with consequent compensation therefor, and the rest not? The moment it is conceded that the right to shed, once granted, is a valuable property right, entering in, as an important element, to that due compensation which must be paid by the city before it can deprive the owner of his property in and to the pier, and the rights appurtenant thereto, it must appear, it seems to me, that that right which has existed from 1875 down to 1900 could not be destroyed by the accident of fire, but that it was the duty of the commissioners in valuing pier 20 to value it as a pier to which the right was appurtenant to be a shedded pier with all that that means to the owner in relation to the steam commerce of the port.

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So far as pier 19 is concerned, for which no permit to shed had at any time been granted, and which never had been shedded, we are satisfied with the decision of the court below. It would be going altogether too far into the realm of speculative finance to allow, as an element of the value of a pier which had been for a long number of years in existence, and which never had been shedded, the possibility that inasmuch as it was a pier, the time might come when, upon application, the dock department might grant permission to shed it, especially as the dock department could attach conditions and restrictions to permits for sheds erected for the first time after 1875, and could make them revocable. A possible right to obtain a revocable permit is not a proper element of value.

It follows, therefore, that the order appealed from should be reversed and the report be sent back to the commissioners with instructions to modify the same by treating pier 20 as a shedded pier with an irrevocable permit, and make their valuation accordingly, with ten dollars costs and disbursements to the appellants.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed and report sent back to commissioners, as stated in opinion, with ten dollars costs and disbursements to appellants. Settle order on notice.

SARAH A. O'REILLY, as Sole Executrix, etc., of HUGH O'REILLY, Deceased, Appellant, v. PATRICK SKELLY, Respondent, Impleaded with WILLIAM P. FOGARTY, Individually and as Administrator with the Will Annexed, etc., of PATRICK A. FOGARTY, Deceased, and Others, Defendants. (No. 1.)

First Department, February 8, 1907.

Practice — order that plaintiff amend complaint separately stating actions — right to restrict amended complaint to one cause.

When the plaintiff has served a complaint containing more than one cause of action and an order has been granted requiring the service of an amended complaint separately stating and numbering the alleged causes of action, the order does not mean that the plaintiff *volens volens* must serve a complaint containing two causes of action. The order is complied with if the plaintiff serve an amended complaint setting up but one cause of action, and the defendant will be ordered to accept service thereof.

APPEAL by the plaintiff, Sarah A. O'Reilly, as executrix, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 27th day of December, 1906, denying the plaintiff's motion for an order requiring the attorneys for the defendant Skelly to accept and admit service of the amended complaint as of December 12, 1906.

Edward W. S. Johnston of counsel [*Johnston & Johnston*, attorneys], for the appellant.

Richard H. Clarke, Jr., of counsel [*Clarke & Clarke*, attorneys], for the respondent.

CLARKE, J.:

The plaintiff served a complaint. The defendant Skelly, upon an affidavit in which he alleged that more than one cause of action was attempted to be pleaded in said complaint, and that he was unable to properly prepare his answer, unless the plaintiff served an amended complaint separately stating and numbering the two alleged causes of action therein described, made a motion at Special Term for an order to compel the plaintiff to serve an amended complaint, separately stating and numbering the alleged causes of action attempted to be pleaded in her complaint. The Special Term, by an order dated the 10th day of December, 1906, granted the motion and ordered "That the plaintiff herein, within ten days after the service of a copy of this order with notice of the entry thereof on her attorneys, serve an amended complaint separately stating and numbering the causes of action attempted to be pleaded in said complaint." A copy of the said order was served upon the plaintiff's attorney on December eleventh, and within the time there limited, to wit, on the 12th day of December, 1906, plaintiff served an amended complaint on the attorneys for the respondent. Said complaint commenced with the following language: "The above named plaintiff complains of the above named defendants and for a single cause of action by this, her amended complaint, alleges as follows:" There is no doubt that the pleader has intended to set up but one cause of action. In her affidavit the plaintiff asserts that the amended complaint states but one cause of action and that she

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has but one cause of action. On the same day the attorneys for the respondent returned said amended complaint to the plaintiff's attorneys with a notice that it was returned because it did not comply with the order of the Special Term of the tenth day of December, "Inasmuch as said alleged amended complaint does not separately state and number the alleged causes of action attempted to be pleaded in the original complaint as is required by the terms of said order." Thereupon the plaintiff made a motion to require the attorneys for the respondent to accept and admit service of the amended complaint as of the day upon which it had been served. The Special Term having denied said motion by an order made on the twenty-seventh day of December, the plaintiff appeals.

The court having determined that the original complaint set up two causes of action ordered an amended complaint to be served. The order did not mean, nor could the court have intended that it should mean, that the plaintiff was compelled *nolens volens* to serve an amended complaint containing two causes of action. It was not the purpose of the order, and could not have been the intention of the court, to compel a litigant to assert a cause of action which it did not possess and could not support. The order provided that the plaintiff should "serve an amended complaint separately stating and numbering the causes of action attempted to be pleaded in said complaint." The words "said complaint" plainly refer to the amended complaint to be served, and the order required that in said amended complaint if there were two or more causes of action they should be separately stated and numbered.

In obedience to that order the plaintiff served an amended complaint, and in that complaint the causes of action attempted therein to be pleaded are separately stated and numbered, to wit, it is asserted that the plaintiff "complains of the above named defendants and for a single cause of action by this, her amended complaint, alleges. * * *." The plaintiff having complied with the order of December tenth, the respondent improperly returned the amended complaint served and the plaintiff was justified in moving to compel its receipt as of the day when served and the denial of said motion was error.

The order appealed from should be reversed, with ten dollars

costs and disbursements, and the motion granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

SARAH A. O'REILLY, as Sole Executrix, etc., of HUGH O'REILLY, Deceased, Appellant, v. PATRICK SKELLY, Respondent, Impleaded with WILLIAM P. FOGARTY, Individually and as Administrator with the Will Annexed, etc., of PATRICK A. FOGARTY, Deceased, and Others, Defendants.* (No. 2.)

First Department, February 8, 1907.

APPEAL by the plaintiff, Sarah A. O'Reilly, as executrix, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of December, 1906, directing the plaintiff to serve an amended complaint separately stating and numbering the alleged causes of action attempted to be pleaded.

Edward W. S. Johnston of counsel [*Johnston & Johnston*, attorneys], for the appellant.

Richard H. Clarke, Jr., of counsel [*Clarke & Clarke*, attorneys], for the respondent.

PER CURIAM:

This is an appeal from an order requiring the service of an amended complaint, and the matters relating thereto have been considered in the memorandum on the appeal from the order of December twenty-seventh (117 App. Div. 559), handed down herewith.

The order appealed from should be affirmed, without costs.

Present — PATTERSON, P. J., INGRAHAM, LAUGHLIN, CLARKE and SCOTT, JJ.

Order affirmed, without costs. Order filed.

* See *O'Reilly v. Skelly*, No. 1 (*ante*, p. 559).—[REP.]

JAMES MEANEY, as Administrator, etc., of EDWARD MEANEY,
Deceased, Respondent, v. POST & McCORD, Appellant.

First Department, February 8, 1907.

Costs — when security required of foreign administrator.

When it is established without dispute that the plaintiff in an action based on personal injuries resulting in death as well as all the next of kin of the deceased are residents of another State and that the decedent was unmarried and left no children or children of deceased children and that the only asset in this State is the cause of action against the defendant, the plaintiff should be required to give security for costs.

APPEAL by the defendant, Post & McCord, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of December, 1906, denying the defendant's motion for an order requiring the plaintiff to file security for costs.

Louis Cohn of counsel [*Frank V. Johnson*, attorney], for the appellant.

Francis J. Hogan, attorney for the respondent.

CLARKE, J. :

This action was brought to recover damages for personal injuries resulting in the death of the plaintiff's intestate by reason of the alleged negligence of the defendant. The summons and complaint were served on the 13th day of September, 1906. On the 19th day of November, 1906, prior to the last day to plead, an order to show cause was obtained why an order should not be made requiring the plaintiff to furnish security for costs on the ground that the action was brought by an administrator in his representative capacity and that he and all of the next of kin prior to and up to the commencement of the action were non-residents. The motion having been denied, defendant appeals.

It was established without dispute that the plaintiff and all the next of kin of the deceased had resided for many years and still reside in the city of Camden, N. J., and that the decedent was unmarried and left no children or children of deceased children,

and the only asset in this State was the cause of action against the defendant. *Pursley v. Rodgers* (44 App. Div. 139) is directly in point. In that case the plaintiff, a resident of Virginia, was appointed administratrix in New York county and in her representative capacity for the benefit of the next of kin, all of whom resided in the State of Virginia, she commenced an action in New York. It appeared that the intestate left no property in New York and that the letters were issued simply to permit the administratrix to begin an action for damages for the death of her intestate caused by the alleged negligence of the defendant. Upon these facts the attorney for the defendant Rodgers moved for an order requiring the plaintiff to file security for costs. The motion was denied, and upon appeal to this court the order entered thereon was reversed and the motion granted. Mr. Justice BARRETT said: "We thus have a case where the plaintiff and all the parties whom she represents are non-residents of this State and where there is apparently no estate or property of any kind within our jurisdiction (or indeed elsewhere), from which costs in case the plaintiff should fail in the action could be collected. We think that these facts entitled the defendant to the favorable exercise of the court's discretion; that the application was addressed to that discretion, and that the defendant's motion for security should have been granted;" and Mr. Justice INGRAHAM, concurring, said: "But where the action is brought by one individual for the benefit of other individuals, and both the one bringing the action and the ones for whose benefit it is brought are non-residents, no one interested in the recovery in any manner being a resident, I cannot see upon what principle it can be said that the plaintiffs are not non-residents."

The respondent cites *McNeil v. Merriam* (57 App. Div. 164). That case was in the second department, and is distinguishable from the case at bar both because the order directing the plaintiff to give security for costs had been entered *ex parte* and because no question of non-residence seems to have been presented. The learned court said: "When the defendant invokes discretion under section 3271,* he must apply to the court and necessarily upon notice. (*Pursley v. Rodgers*, 44 App. Div. 139, 142.) In the

* Code Civ. Proc. § 3271.— [REP.]

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absence of such procedure this court will not presume that plaintiff's attorney has waived any of the rights of his client in support of an order which may deprive the plaintiff of the power of enforcing a meritorious claim." *Davidson v. Rose* (57 App. Div. 212) was also a decision of the second department, and is also distinguishable from the case at bar by the failure of the papers to establish the non-residence of the plaintiff to the satisfaction of the court. The court said: "It will hardly require discussion to determine that this affidavit contains none of the elements of legal evidence, and is not a proper basis of an order to give security for costs on the ground that the plaintiff is a non-resident."

It appearing, therefore, that the rule as laid down in *Pursley v. Rodgers* (*supra*) has not been affected by any subsequent decision of the Court of Appeals, or of the Appellate Division, in this or any other department, and satisfied as we are of the soundness of that rule, it must be applied in the case before us.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

CHELLIE CLAYMAN, Appellant, v. THE CITY OF NEW YORK,
Respondent.

First Department, February 8, 1907.

**Assault and battery — liability of municipality for unauthorized arrest
at instigation of street cleaning department.**

The plaintiff was arrested for sweeping refuse into a street of the city of New York in violation of section 1 of the ordinance of March 11, 1902, approved March 18, 1902. The arrest was made by a policeman without a warrant who acted at the request of an employee of the street cleaning department. Neither the officer nor the employee witnessed the offense. The employee requested the arrest under instructions of the street cleaning department, which required employees who "witnessed" violations of the ordinance to

cause the arrest of the offender by the nearest policeman and to become a witness in the case.

Held, that although under the circumstances the arrest was authorized neither by the instructions of the street cleaning department nor by the law, the arrest was not made by an employee of the street cleaning department but by the police;

That as the police department is one of its governmental agencies the city is not liable for the acts of policemen under the doctrine of *respondeat superior*;

That the arrest could not be considered to have been made by the police as an adjunct of the street cleaning department.

APPEAL by the plaintiff, Chellie Clayman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of June, 1906, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

Nathan Ballin [*Abraham L. Gutman* of counsel with him on the brief], for the appellant.

Theodore Connoly [*Royal E. T. Riggs* of counsel with him on the brief] [*William B. Ellison, Corporation Counsel*], for the respondent.

CLARKE, J.:

The complaint alleges two causes of action: *First*, that on March 26, 1903, plaintiff was lawfully occupying her rooms at 332 Cherry street; that one Geottardo Ferrara, a servant of the defendant, was engaged in the regular prosecution of his duties as street sweeper of the street cleaning department on Cherry street. That while so engaged and in the regular discharge of his duties, the said Ferrara, in his endeavor to prevent an alleged violation of the municipal ordinances, caused, instigated and directed several persons, also employees of the city of New York, to wit, policemen of the said city, to lay violent hands upon the plaintiff, to enter her rooms, to drag her down the stairs of her dwelling house and to drag her along the sidewalk for several yards and otherwise to brutally assault her; the said street sweeper joining in said assault. The second cause of action alleges that on the 26th day of March, 1903, the said Ferrara, the street sweeper as aforesaid, in the discharge of his duties as said street sweeper, for the alleged purpose of enforcing the ordinances

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of the city in respect to the care of streets, wrongfully and unlawfully caused the plaintiff to be arrested without the issuance of a warrant and placed the plaintiff under custody of police officers of the city of New York. That she was conducted to Bellevue Hospital and there detained seven days; that on April 3, 1903, she was discharged by the magistrate in the Essex Market Police Court; that the arrest was wholly without probable cause. The evidence tended to show that plaintiff was the janitress of 332 Cherry street in the city of New York on March 26, 1903. On that day, while she was in her room about eleven or twelve o'clock in the morning, a policeman and a street sweeper came to the door of her room. The door was open. Although she spoke no English, she thought the officer came on account of the ashes and garbage. He said to her, "Come on." She went with him down stairs and the officer showed her where she had swept some rubbish from the sidewalk into the street, and she said, "No, I was not down stairs and I did not sweep because I was sick." She further testified: "Then I went to go back upstairs again. He got hold of me that way (indicating). 'Come up to the station house.' I say 'I am sick and I cannot go to the station house.' Then I said 'Let me go upstairs' and he said, 'No, come on to the station house.' I sat down on the steps because he would not let me go up in the house; he got hold of my hand and dragged me and the street cleaner said 'Take her. Take her.'"

At this time the plaintiff was in an advanced state of pregnancy and expected to be delivered of a child either that day or the next. A neighbor informed the policeman of the woman's serious condition and she went into the rooms of another neighbor and laid down on the lounge. The policeman called an ambulance and the surgeon examined the plaintiff. The officer, who by this time had been joined by other officers, started to put plaintiff on a stretcher to carry her to the ambulance. The plaintiff, associating the stretcher with the carrying out of dead bodies, became alarmed, the children began to cry, and she refused to be put on the stretcher, so the officers carried and dragged her down and put her in the ambulance. Within an hour after she was taken to the hospital her baby was born. She remained in Bellevue from the 26th of March until the 3d of April, 1903, and on that day she was taken by a policeman to the Essex Market Police Court and arraigned on

a charge of violating a city ordinance. The complaining witness was Ferrara. The magistrate discharged her. The ordinance she was accused of violating was as follows: "No person or persons shall throw, cast or lay or direct, suffer or permit any servant, agent or employee to throw, cast or lay any ashes, offal, vegetables, garbage, dross, cinders, shells, straw, shavings, papers, dirt, filth or rubbish of any kind whatsoever in any street in the city of New York, either upon the roadway or sidewalk thereof, except that in the morning before 8 o'clock or before the first sweeping of the roadway by the Department of Street Cleaning, dust from the sidewalk may be swept into the gutter if there piled, but not otherwise and at no other time. The wilful violation of any of the foregoing provisions of this section shall be and is hereby declared to be a misdemeanor and shall be punished by a fine of not less than one dollar nor more than ten dollars or by imprisonment for a term of not less than one nor more than five days." (§ 1, ordinance of March 11, 1902; approved March 18, 1902.)

The officer who made the arrest acted without a warrant. Previous to the arrest, a letter of instruction of the street cleaning department was issued to the district superintendents to enforce the ordinance above set forth. "Where people are found to be violating the law in sweeping their stores out from the pavements into the streets after 8 o'clock in the morning, it will be necessary for the foreman or detailed man who witnesses such violations to cause the arrest of the offender by reporting the matter to the nearest policeman and becoming a witness in the case, as this is the only way in which this abuse can be thoroughly corrected. These means will have to be adopted."

At the close of plaintiff's case, the complaint was dismissed and from the judgment entered thereon the plaintiff appeals.

It is impossible to read this record without feeling that the plaintiff was subjected to a gross outrage. That a woman within an hour of her confinement should have been forcibly arrested without a warrant by a number of policemen for a minor misdemeanor not committed in the presence of any one of them, and in no way affecting the public peace, is a demonstration of a kind of official stupidity which tends to bring the enforcement of the law under public condemnation. Nevertheless, the question is presented

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whether the city is liable in damages for the acts of the individuals complained of.

Appellant claims that the city is responsible because the acts complained of were done by and upon the instigation of a street sweeper, an employee of the department of street cleaning, which department was not one of the governmental agencies of the city, but exercised functions incident to the city in its individual or private capacity. It is true that it is the law that a municipal corporation is liable in damages for the torts by its agents and servants in the same way, on the same ground and to the same extent as an individual principal or master, for the acts of those departments in which it does not exercise acts of government or general sovereignty. It has been expressly held that "It is clear upon principle and authority that the city of New York in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the Legislature, in the exercise of which it is a legal individual as distinguished from its governmental functions when it acts as a sovereign." (*Missano v. Mayor*, 160 N. Y. 123.) In that case the city was held liable in damages for the death of a child who was run over and killed by a horse attached to an ash cart of the street cleaning department. The argument of the appellant, therefore, is that as the acts complained of grew out of an alleged violation by the plaintiff of an ordinance of the city in regard to cleanliness of the streets and were upon the instigation of the street sweeper in the performance of his duty as an employee of the street cleaning department, therefore, the city is responsible under the doctrine of *respondet superior*.

So far as the first cause of action, the assault, is concerned, it does not appear that the sweeper participated therein further than in pointing the plaintiff out to the officer and saying, "Take her Take her." It further appears clearly that the alleged assault was but a part of the illegal arrest and not an independent transaction. The duty of the street sweeper was clearly defined by the instructions which provided that "where people are found to be violating the law in sweeping their stores out from the pavements into the streets, * * * it will be necessary for the * * * detailed man who witnesses such violations to cause the arrest of the offender by

reporting the matter to the nearest policeman and becoming a witness in the case." These instructions were addressed to those employees only who witnessed an offense. Thereunder, the street sweeper's duties, as an eye witness of a violation, were confined to reporting the matter to the police and becoming a witness. Of course, no power was conferred upon the policeman to arrest without a warrant for this misdemeanor not committed in his presence.

So far, therefore, as the arrest in this case is concerned, it was neither authorized by any instructions of the street cleaning department, nor by the law. The arrest, however, was made, not by an employee of the street cleaning department, but by the police. The police department and its subordinates are not, and never have been, considered to be in the same category as the street cleaning department. The police department is one of the governmental agencies of the State, and for the unauthorized or tortious acts of its members the city has never been held responsible under the doctrine of *respondeat superior*.

The appellant urges that the officer who made the arrest did not act in his public or governmental capacity, but acted as an adjunct of the street cleaning department in enforcing the ordinance of the city in relation to the condition of the streets, and that as the municipality's duties to keep the streets clean is a private one, and not one of the duties of sovereignty, the city should be liable.

The answer is that the policeman was commanded by the Legislature to enforce and prevent the violations of all laws and ordinances in force in this city. (Greater New York charter [Laws of 1901, chap. 466], § 315.) The officer was either acting entirely outside the scope of his duty, in which event the city would not be responsible therefor, or was performing a public duty in making the arrest, and was carrying out the mandate of the Legislature imposed especially upon him, and upon no other class of State servants. Ordinances duly passed have the same force and effect as laws passed by the Legislature. "The authority to enact by-laws is delegated to the city by the sovereign power and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the Legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants." In their enforce-

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ment, therefore, police officers act in their public capacity, and not as the agents or servants of the city." (*Buttrick v. City of Lowell*, 1 Allen, 174).

"It cannot be doubted that the Legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the Legislature of the State, and are to be respected by all." (*New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471, 481.)

In *Woodhull v. Mayor* (150 N. Y. 450) action was brought against the city to recover damages for an alleged false imprisonment. The arrest was made by a police officer of the Brooklyn bridge trustees. The court distinctly held that police officers appointed by a city are not its agents or servants, and although the officers whose acts were complained of in that case were appointed by the bridge trustees, held that the same rule applied to them. Judge HAIGHT said: "He was a policeman, appointed as such and acting in that capacity, and when he stepped inside of the car placed his hand upon the shoulder of the plaintiff and announced to him that he was under arrest, he was acting in his character of policeman, and not within the scope of any employment as an agent or servant of the municipalities."

It seems clear, therefore, that the city is not responsible in damages to the plaintiff in this case. The illegal arrest having been by a police officer, her cause of action is against him.

The dismissal of the complaint was, therefore, required, and the judgment should be affirmed, with costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Judgment affirmed, with costs. Order filed.

JOHN FULTON, Appellant, v. GEORGE A. VARNEY and L. J. OSTRANDER, Doing Business Under the Firm Name and Style of GEORGE A. VARNEY & Co., Respondents.

First Department, February 8, 1907.

Contract — past act not consideration for promise — pleading — failure to allege consideration or performance — promise to pay out of a particular fund not negotiable instrument.

Action upon a contract. The plaintiff for a first cause of action alleged in substance that in consideration of notification by the plaintiff that certain work was to be performed and in consideration of the plaintiff's recommendation that defendants were proper persons to perform the work, the defendants agreed to pay the plaintiff half of the profits arising from the work, and that thereafter the defendants at the request of the plaintiff delivered a writing by which they agreed to pay the plaintiff ninety days after date a stated sum to be considered as part of the profits, as per the verbal agreement. As a second cause of action the plaintiff alleged that the defendants for a valuable consideration executed and delivered to the plaintiff the paper before set forth, that the plaintiff was the sole owner thereof, and that no part had been paid.

On demurrer,

Held, that if the allegations of the first cause of action be construed to allege that the verbal promise was made after the information and recommendation of the plaintiff, it was for services previously rendered and the contract was unenforceable for lack of consideration;

That if the agreement were made after services rendered without employment or request of the defendants there could be no recovery, for a consideration must consist of a present or future act; a past act cannot serve as a consideration for a promise;

That if the allegations be construed as an averment of an agreement to pay for information to be supplied thereafter by the plaintiff the complaint was insufficient in failing to allege performance;

That the paper set out in the complaint was not a negotiable instrument in that it was not an unconditional promise or order to pay a sum certain in money, but was a promise to pay out of a particular fund, and in that it was not payable to order or bearer;

That the instrument not being negotiable or under seal the allegation that it was executed and delivered for a valuable consideration without setting out facts showing the consideration was a mere conclusion of law;

That the second cause of action was also defective in failing to allege that any profits had been earned by the defendant.

APPEAL by the plaintiff, John Fulton, from an interlocutory judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 9th

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day of June, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining demurrers to both causes of action set forth in the amended complaint.

John H. Hazelton, for the appellant.

Allan C. Rowe of counsel [*Purdy, Squire & Rowe*, attorneys], for the respondents.

CLARKE, J. :

The complaint alleges that heretofore the defendants, for and in consideration of the securing by the plaintiff of notification to the defendants of the fact that Cottier & Co. desired certain work to be performed at No. 3 East Fortieth street, in the borough of Manhattan, city, county, and State of New York, for and in consideration of the securing by the plaintiff of the notification to the defendants of the fact that the architect of said work to be performed, Joseph H. Taft, was receiving bids therefor, and for and in consideration of the recommendation to the said Joseph H. Taft by the plaintiff of the defendants as proper persons to perform said work to be performed, all or several, the defendants agreed to pay to the plaintiff a sum of money equal to one-half of the profits to the defendants arising from or out of the said work to be performed and to allow the plaintiff all reasonable and proper examination of the defendants' books and papers to ascertain the amount of such profits. That heretofore the defendants, at the request of the plaintiff, executed and delivered to the plaintiff a paper writing, dated February 3, 1905, by which they agreed to pay to the plaintiff, to be considered as a part of such profits, the sum of \$1,059.19, ninety days from the date thereof, said paper reading: "As per verbal agreement made between Mr. John Fulton, Jr., and our Mr. Varney, we hereby agree to pay you the sum of Ten hundred Fifty-nine dollars and Nineteen cents (\$1,059.19), ninety days from date, this amount to be paid out of our profits on the 3 East 40th street job." That the profits to the defendants arising from or out of said work are \$12,000, and that no part of the same has been paid to the plaintiff.

The second cause of action alleges that heretofore, and on or about the 3d day of February, 1905, the defendants, for a valuable consideration, executed and delivered to the plaintiff the paper herein-

before set forth; that the plaintiff is the sole owner thereof, and that no part of the same has been paid, wherefore plaintiff demanded judgment for \$6,000.

The defendants demurred to both causes of action upon the ground that facts were not therein stated sufficient to constitute a cause of action, and the demurrer having been sustained, the plaintiff appeals.

In regard to the first cause of action the allegation of the complaint is susceptible, as it appears to me, of two interpretations: *First*, that after the receipt of the information and the giving of the recommendation alleged as consideration, the defendants promised to pay for said information and said recommendation; that is, for services previously rendered. If that be the interpretation intended by the pleader, the complaint is bad because the performance by the plaintiff having preceded the defendants' promise, it is evident that the consideration was a past one and so will not support the contract. If the agreement was made after the services rendered without employment or request of the defendants, there can be no recovery. Consideration must consist of a present or future act. A past act cannot serve as consideration for a promise, as said by Mr. Justice BISCHOFF for the General Term of the Court of Common Pleas in *Winch v. Farmers' Loan & Trust Co.* (11 Misc. Rep. 390): "Construing the instrument, however, to have been a mere promise * * * to pay for information already imparted, the trial judge deemed the complaint to be wanting in substance because of the omission of an averment that the information was imparted at the request of the promisors, express or implied. Obviously in the absence of such a request the promise to pay was *nudum pactum* and the omission to allege it rendered the complaint fatally defective." (Citing authorities.)

Second, if the allegation is to be construed as the averment of an agreement whereby defendants promised to pay for information which plaintiff promised to supply thereafter, it is insufficient in that performance is not averred. It is necessary, it seems to me, that the pleader set forth a promise or offer by the defendants calling for a specific act by the plaintiff and a statement of subsequent performance by the plaintiff of such specific act and the breach by the defendants.

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I see no way to spell out a cause of action. The pleader merely says that in consideration of securing information and his recommendation defendants promised to give him one-half of their profits. I see no way to bring this allegation within the rule as laid down by RUGER, Ch. J., in *Bogardus v. New York Life Ins. Co.* (101 N. Y. 328): "It is essential to the legal statement of such a cause of action that it should show an existing contract and the performance by the plaintiff of such conditions precedent as are thereby provided, or a tender of their performance." The complaint either states that plaintiff performed certain acts without in any way alleging that they were those called for by the defendants' promise or what the terms of that promise were, or that the defendants promised to pay if the plaintiff would perform the acts specified as consideration. The words employed cannot at the same time be construed to mean an allegation that the notifying and recommending were the conditions called for by the defendants' promise and an allegation of the subsequent performance of that notifying and recommending as well. Both statements are necessary and if we assume the complaint does in fact allege either, the other is necessarily lacking.

As to the second cause of action, the allegation thereof is equally deficient in substance. The paper set out in the complaint is not a negotiable instrument. Section 20 of the Negotiable Instruments Law (Laws of 1897, chap. 612) provides that an instrument to be negotiable must, among other things, contain an unconditional promise or order to pay a sum certain in money, and section 22 thereof provides: "But an order or promises to pay out of a particular fund is not unconditional." This instrument provides as follows: "This amount to be paid out of our profits on the 3 East 40th Street job." Being, therefore, a promise to pay out of a particular fund, it is not unconditional. (*American Boiler Co. v. Fontham*, 34 App. Div. 294.) Further, it is not payable to order or to bearer as required by section 20 of the Negotiable Instruments Law.

This instrument not being under seal and not being negotiable, the allegation in the complaint that it was executed and delivered "for a valuable consideration" without in any way setting up the facts showing consideration, is a mere conclusion of law.

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The instrument is at best a conditional promise to pay out of a particular fund, to wit, the profits of the makers in a particular job. As there is no averment in the second cause of action that any profits had been earned on said job, even if consideration had been properly alleged, the complaint would still have failed to set forth sufficient facts to sustain this cause of action.

The interlocutory judgment sustaining the demurrer to the complaint should be affirmed, with costs and disbursements to the respondents, with leave to the appellant, however, within twenty days and upon payment of costs in this court and in the court below to serve an amended complaint.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and SCOTT, JJ., concurred.

Judgment affirmed, with costs, with leave to appellant to amend on payment of costs in this court and in the court below. Order filed.

JAMES A. GRANT, Respondent, v. CANANEA CONSOLIDATED COPPER COMPANY, Appellant, Impleaded with WILLIAM C. GREENE and Others, Defendants.

First Department, February 8, 1907.

Process — when jurisdiction of foreign corporation not obtained by service of summons on president — conflict of laws — when Federal decisions controlling — special appearance to contest jurisdiction.

A foreign corporation not doing business in this State and having no property here and which has not appointed an agent upon whom service can be made, cannot be brought into court in a stockholder's action to obtain a decree adjudging the corporation to be owner of certain mines by service of summons upon its president who did not come into this State as representative of the company.

Although the contrary was heretofore held by the Court of Appeals, a Federal question is involved under the 14th amendment of the United States Constitution, and hence the Federal rule must be followed even though in direct opposition to the decisions of the Court of Appeals which would otherwise be controlling.

The defendant may invoke the Federal rule by a special appearance in the action made solely for the purpose of moving to set aside the service of summons. INGRAHAM, J., dissented, with opinion.

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APPEAL by the defendant, the Cananea Consolidated Copper Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of October, 1906, denying said defendant's motion to vacate the service of a summons upon its president.

M. E. Harby [*F. W. M. Cutcheon* with him on the brief], for the appellant.

Walter B. Raymond [*Samuel S. Watson* and *Chester A. Jayne* with him on the brief], for the respondent.

CLARKE, J. :

This is an appeal from an order of the Special Term denying a motion of the defendant Cananea Consolidated Copper Company for an order vacating the service of the summons upon it through William C. Greene, its president. This is a stockholder's suit brought by the plaintiff on behalf of all the stockholders of the Cobre Grande Copper Company (an Arizona corporation) similarly situated, for the purpose of procuring a decree adjudging that the Cananea Consolidated Copper Company (a Mexican corporation, hold the legal title to certain mines and mining properties in the Republic of Mexico, in trust for the Cobre Grande Company, and of compelling the defendants W. C. Greene, the Greene Consolidated Copper Company, and the Cananea Consolidated Copper Company to account for and pay over to the defendant Cobre Grande Copper Company all benefits of every kind, if any, derived by them or any of them, from any of the said properties, and of obtaining other like relief. On October 8, 1906, a summons indorsed to William C. Greene, as president of the Cananea Consolidated Copper Company, was handed to William C. Greene, president of the appellant, in New York city. The Cananea Company thereafter appeared specially, and moved that the service of the summons be vacated.

It nowhere appears in the record that the plaintiff is a resident or citizen of this State. The ground of the motion is that the defendant is a foreign corporation; that it does no business in the State of New York; that it has no office in this State; that it has appointed no agent upon whom service could be made, and that

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the action being *in personam* the courts of this State, under such circumstances, have no jurisdiction over it. Section 432 of the Code provides that "Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof within the State, as follows: 1. To the president, vice-president, treasurer, assistant treasurer, secretary, or assistant secretary, or, if the corporation lacks either of those officers, to the officer performing corresponding functions under another name."

In *Pope v. Terre Haute Car Mfg. Co.* (87 N. Y. 137) the Court of Appeals said, EARL, J., writing the opinion: "The plaintiffs are residents of this State, having a cause of action arising upon contract against the defendant, an Indiana corporation. They caused a summons for the commencement of an action to be served upon the defendant's president within this State, and it made a motion to set aside such service, on the ground that it was unauthorized and ineffectual for any purpose. * * * It appears that the defendant being a foreign corporation had no place of business, and transacted no business and had no property within this State, and that at the time its president was served he was temporarily within this State, for purposes of his own, on his way to a seaside resort, and not in his official capacity or upon any business of the defendant." Nevertheless the court held that the service was a good service, and declined to set it aside. That decision was in November, 1881. The Supreme Court of the United States, however, in a long series of cases, beginning with *Pennoyer v. Neff* (95 U. S. 714); *St. Clair v. Cox* (106 id. 350), and continuing down to *Remington v. Central Pacific R. R. Co.* (198 id. 95), has declared a contrary doctrine. In *Goldey v. Morning News* (156 U. S. 518), that court decided that service in New York upon the president of the defendant corporation, a Connecticut concern, temporarily within the State, was invalid, it appearing that the defendant corporation was doing no business in the State of New York, and had no resident agent or property therein. The suit had been commenced in the Supreme Court, in the county of Kings, and was removed into the Circuit Court of the United States for the Eastern District of New York. It was decided in 1895, and Mr. Justice GRAY, delivering the unanimous opinion of the court, said: "Upon the question of the validity of such a service as was made in this case, there has

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been a difference of opinion between the courts of the State of New York, and the Circuit Courts of the United States. Such a service has been held valid by the Court of Appeals of New York. (*Hiller v. Burlington & Missouri River Railroad Co.*, 70 N. Y. 223; *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137.) It has been held invalid by the Circuit Courts of the United States, held within the State of New York (citing a large number of cases.) It becomes necessary, therefore, to consider the question upon principle, and in the light of the previous decisions of this court. It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. * * * A judgment rendered in a court of one State against a corporation neither incorporated nor doing business within the State, must be regarded as of no validity in the courts of another State, or of the United States, unless service of process was made in the first State upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another State, and only casually within the State and not charged with any business of the corporation there." In *Conley v. Mathieson Alkali Works* (190 U. S. 406), the plaintiff was a citizen of New York and the defendant was incorporated in the State of Virginia. Plaintiff brought an action in the Supreme Court of New York against the defendant for moneys alleged to be due on a contract which was alleged to have been made in the city of New York. The defendant had designated no agent upon whom service could be made, and summons was served upon two members of the board of directors, both residents of the city of New York. The defendant had been engaged in business and had owned and operated a manufacturing plant within the State up to a few months prior to the service. But it had conveyed this plant and all of the property of every kind and description to another corporation organized under the laws of Virginia and had ceased doing business or holding property within the State. It was said: "The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company and that the operations of that company were carried on under the

same management as before December 31, 1900, is not material. The new corporation was a separate legal entity and whatever may have been the motives leading to its creation it can only be regarded as such for the purposes of legal proceedings. It was that corporation alone which transacted any business in this State, notwithstanding it may have been, for all practical purposes, merely the instrument of the defendant corporation." The court then reviewed the provisions of the New York Code of Civil Procedure and reaffirming the doctrine of *Goldey v. Morning News* (*supra*), said: "The principle announced in *Goldey v. Morning News* covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially, there representing the corporation in its business. (*St. Clair v. Cox*, 106 U. S. 350.) In other words, a corporation must be doing business there." In *Caledonian Coal Co. v. Baker* (196 U. S. 432) the president of the Santa Fe Railroad Company was served with process while on a railroad train passing through New Mexico. The court said: "It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant 'except by actual service of notice within the jurisdiction upon him, or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service.' (Citing cases.) This principle is applicable to all courts. We are of opinion that the service of summons upon Ripley, as president, while he was passing through the territory on a railroad train was insufficient as a personal service on the company of which he was president. It is true that the company owned lands in the territory, but its office, at which the meetings of its directors were held, was in the city of New York, while the office of its land commissioner was at Topeka, Kansas, and the office of its president was at Chicago, Illinois. The mere ownership of lands in New Mexico, or the bringing of suits there to protect its lands against trespasses, could not have had the effect to put the company into that territory for the purposes of a personal action against it based on service of summons upon one of its officers while passing through the territory on a railroad train."

In *Pennoyer v. Neff* (95 U. S. 714) the United States Supreme

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Court considered the language of several decisions of various State courts of the kind illustrated by the *Pope* case, where our Court of Appeals said: "A judgment to be rendered in an action thus commenced against a foreign corporation will be valid for every purpose within this State and can be enforced against any property at any time found within this State. Its effect elsewhere need not now be determined." The Supreme Court of the United States in the *Pennoyer Case* (*supra*) said: "But if the court has no jurisdiction over the person of the defendant by reason of his non-residence and consequently no authority to pass upon his personal rights and obligations; if the whole proceeding without service upon him or his appearance is *coram non judge* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice—it is difficult to see how the judgment can legitimately have any force within the State. * * *

In later cases this language is repeated with less frequency than formerly, it beginning to be considered as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice and as an absolute nullity because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered. * * *

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."

The respondent in the matter at bar admits that a Federal question is involved, as indeed is clearly the case. (U. S. Const. 14th Amendt. § 1.) It has been raised in the proper manner by a special appearance solely for the purpose of moving to set aside the service of the summons. A Federal question being thus raised, we are bound to follow the decisions of the Supreme Court of the United States even if they are in direct opposition to decisions of the Court of Appeals, which would otherwise be controlling. (*Wintermister v. First National Bank*, 64 N. Y. 212; *Duncomb v. New York, H. & N. R. R. Co.*, 84 id. 190; *Sibley v. Sibley*, 76 App. Div. 132.)

The decisions of the Supreme Court of the United States in the

Goldley Case and the *Conley Case* (*supra*) were made many years after the decision of the *Pope Case* (*supra*) by the Court of Appeals, and it is not to be doubted but that the learned Court of Appeals, when the question is again before it, will say of its former decision as it said in *Sander v. State of New York* (182 N. Y. 400) of the reversal of the case of *Muhlker v. N. Y. & H. R. R. Co.* (197 U. S. 544): "Of course, with the decision of the Supreme Court in the *Muhlker* case, our own decisions in the cases cited have ceased to be authorities."

It follows, therefore, that the Cananea Copper Company has not been properly brought into court by the service of a summons upon its president, said president not being in this State as the representative of said company, which does no business and has no property herein.

It, therefore, follows that the order appealed from should be reversed, with costs and disbursements in this court, and the motion granted, with ten dollars costs.

PATTERSON, P. J., LAUGHLIN and SCOTT, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

The question presented on this motion is not whether a judgment entered in this action is entitled to be enforced as against the defendant outside the State of New York. The Code of Civil Procedure (§ 432) authorizes the service of the summons upon the president or other officer of a foreign corporation within this State, and it seems to me that the court, by such service, at least acquires jurisdiction over the defendant sufficient to authorize a judgment which will be valid in this State. I do not understand that the decision of the Supreme Court of the United States cited by Mr. Justice CLARKE in the prevailing opinion interferes with the right of the State of New York to grant a judgment against a foreign corporation where process has been served in accordance with its laws, and which could be enforced in this State. For that reason I think the court should maintain jurisdiction, leaving the effect of a judgment to be determined when such a judgment is obtained.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

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In the Matter of the Estate of PATRICK A. FOGARTY, Deceased.
SARAH A. O'REILLY, as Executrix, etc., of HUGH O'REILLY,
Deceased, Appellant; PATRICK SKELLY and Others, as Resid-
uary Devisees, Respondents.

First Department, February 8, 1907.

Executors and administrators — accounting by representative of deceased trustee — jurisdiction of surrogate and Supreme Court — issues involving title to real estate.

The Supreme Court and the Surrogate's Court have concurrent jurisdiction to require the personal representatives of deceased executors and trustees to account for property which came into their hands. Ordinarily the Supreme Court will refuse to exercise its jurisdiction unless the jurisdiction of the Surrogate's Court be insufficient to determine all the questions involved.

The Surrogate's Court having a limited jurisdiction and being without power to try title to real estate, should refuse to require the representative of a deceased trustee to account when a question involving the title to real estate must be decided as a prerequisite to the accounting.

APPEAL by Sarah A. O'Reilly, as executrix, etc., from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 12th day of December, 1906, requiring her to file a duly verified account of the proceedings of said Hugh O'Reilly, deceased, as executor of and trustee under the will of Patrick A. Fogarty, deceased.

Edward W. S. Johnston, for the appellant.

Richard H. Clarke, Jr. [*Franklin H. Mills* with him on the brief], for the respondents.

LAUGHLIN, J.:

It appears that Patrick A. Fogarty died February 25, 1889, leaving a last will and testament, in and by which he appointed Hugh O'Reilly, William Purcell and the petitioner, Patrick Skelly, executors and trustees. Letters testamentary were issued to them and they qualified and entered upon the discharge of their duties. By a proceeding instituted in the Surrogate's Court, of which all parties in interest had due notice, the accounts of the executors were duly settled by a decree of the Surrogate's Court, made and entered

on the 17th day of January, 1895, as of the 31st day of December, 1894, and the executors were discharged upon paying over to themselves as trustees under the will the sum of \$11,247.64. The letters issued to Purcell were revoked on the 29th day of October, 1895, and it appears that subsequent to the time of his discharge as executor and up to the time of his death, on March 7, 1900, he did not act as trustee. The petitioner, Skelly, and the decedent, O'Reilly, remained trustees until the death of the latter on March 21, 1904, but it is alleged by the petitioner that the decedent O'Reilly was the active trustee. It is in effect admitted in the petition that the decree settling the accounts of the executors was complied with, and that the trustees, including the deceased trustee, have accounted for the money received by them as trustees from themselves as executors. It is also alleged that the decedent was the active executor, and that in the accounting of the executors, of which he had charge, they accounted for one-half of the rents, issues and profits of the premises known as No. 81 Ridge street, borough of Manhattan, New York. It appears by the answer of the appellant that in the accounting they accounted for one-half of the rents, issues and profits of said premises from Fogarty's death, which occurred on February 25, 1889, down to and including the 31st day of December, 1894. It now appears that a deed of said premises, signed and acknowledged by the deceased executor, individually, and his wife, bearing date October 23, 1883, to said Fogarty, was recorded on the 30th day of June, 1903. The theory of the petitioner is that the title to said premises was in Fogarty from the date of said deed, and that the deceased executor, who personally received the rents, issues and profits of the premises, should have accounted for the whole, instead of one-half; and the moving and reply papers, though vague and indefinite on this subject, may be open to the inference that it is also claimed that he received and failed to account for the rents, issues and profits of the premises from the time of the accounting down to the time of his death. At most, however, the petitioner seeks an accounting concerning one-half of the rents, issues and profits of this parcel of land, from the date of the deed to the former accounting, and for the entire rents, issues and profits from that time until the death of the deceased trustee. The personal representative of the deceased

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trustee, whom the petitioner desires to have account for his acts as executor and trustee, interposed an answer to the petition, setting up the former accounting as a bar, denying that the deceased trustee had failed fully to account, alleging that one-half of the rents for which he accounted constituted a gift to the children of Fogarty, and that he likewise paid over as a gift to the children of Fogarty a like proportion of the rents, issues and profits of the said real estate between the date of the accounting and the time of his death; but, in substance, alleging that he was under no legal obligation so to do, as the title was in him, and specifically alleging that the deed was never delivered and never became operative, and that during the last illness of the deceased executor the deed was surreptitiously taken from his custody and subsequently placed on record without his authority or knowledge, and that, therefore, the title to real estate is necessarily involved in the accounting which the petitioner seeks, and consequently the Surrogate's Court is without jurisdiction.

The learned counsel for the petitioner insists that the recording of the deed nearly twenty years after its execution, and even long after the death of the grantee, raises a presumption of due delivery and that the accounting must be had according to the record title as shown by this deed. Even though there be such a presumption, a question which it is not necessary to decide on this appeal, the presumption is overcome by the facts alleged in the answer. If the deed was not delivered, it of course did not become operative. The appellant cannot be compelled to account until she has an opportunity, in a court of competent jurisdiction, to try that question on the merits. The Supreme Court and the Surrogate's Court have concurrent jurisdiction to require executors and trustees and in case of their death, their personal representatives, so far as property has come into their hands, to account for their acts, and ordinarily the Supreme Court will refuse to exercise its jurisdiction; but where, as here, the jurisdiction of the Surrogate's Court is insufficient to determine all of the questions necessarily involved, the Supreme Court will exercise jurisdiction. (*Hard v. Ashley*, 117 N. Y. 606; *Sanders v. Soutter*, 126 id. 193; *Douglas v. Yost*, 64 Hun, 155; *Matthews v. Studley*, 17 App. Div. 303, 312; *Strong v. Harris*, 84 Hun, 314; *Blake v. Barnes*, 28 Abb. N. C. 401.) The Surrogate's

Court, being a court of limited jurisdiction, and being without jurisdiction to try the title to the real estate, should have dismissed the petition upon it being thus made to appear that a question relating to the title of the real estate, which should be decided before an accounting should be ordered, was involved. (*Matter of Spears*, 89 Hun, 49.)

It follows that the order should be reversed, with ten dollars costs and disbursements, and the petition should be dismissed, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and petition dismissed, with ten dollars costs. Order filed.

CHARLES UGGLA, Respondent, v. ISAAC V. BROKAW, Appellant.

First Department, February 8, 1907.

Nuisance — injury caused by defective construction of building — liability of landlord for damage caused by condition of building — res ipsa loquitur — pleading — facts setting out action for nuisance — reasonable care in erecting building of sufficient strength to withstand storms — liability where tenant erected building — error in charge as to burden of proof.

Where the entire possession of a building has been surrendered to a lessee, the landlord is not liable during the lease for any injuries resulting from negligence through a failure to keep the building in repair, and in order to charge him it must be shown that the accident was the result of a condition which constituted a nuisance and which existed at the time the landlord surrendered the entire possession to the tenant or of which he afterward had actual notice.

It is better for a pleading to characterize the nature of the action, but this is not imperatively required where the essential facts to support it are pleaded.

Hence, a complaint alleging that the plaintiff was injured while driving on a city street by the fall of building material from the top of a building upon the defendant's premises due to the fact that the roof was negligently and dangerously constructed; that the accident was occasioned by the carelessness of the defendant in failing to have the roof properly secured and that the defendant had knowledge and notice of this condition but refused and neglected to repair, authorizes a recovery on the theory of a nuisance, although nuisance is not expressly pleaded.

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In erecting buildings near a public street reasonable care must be exercised to construct them so securely that they will withstand any storm which a reasonably prudent man familiar with local weather conditions would anticipate, but an owner is not an insurer against damage caused by a wind of hurricane velocity or by an earthquake.

Hence, since the evidence showed that the injury was caused by a heavy skylight being torn from its fastenings upon the roof by a wind, the velocity of which was between fifty and seventy-three miles per hour, and there was a conflict as to the sufficiency of the manner in which the skylight was attached, it was proper to submit to the jury the question as to whether the storm was of such unusual violence that the defendant in constructing the building was not required to guard against danger incident thereto.

As the jury was instructed that the defendant was not liable unless the skylight was improperly constructed and insecurely fastened to the building originally, it is immaterial that the trial judge did not expressly submit the case upon the theory of nuisance and that he made frequent reference to negligence.

A landlord cannot escape liability for damage resulting from a nuisance which existed at the time the building was constructed on the ground that the building was erected by his tenant, especially where the landlord reserved partial control as to the plan and construction thereof.

A *prima facie* case against the owner of real property is made out by proof of the existence of a nuisance and either that it was created in whole or in part by the owner or existed in such manner that he was chargeable presumptively with knowledge thereof.

Hence, it is reversible error to charge that the fall of the skylight created a presumption that it was not properly secured which the defendant must meet by contrary proof. The doctrine *res ipsa loquitur* would not establish even *prima facie* that the building was a nuisance when constructed.

SCOTT and McLAUGHLIN, JJ., dissented, with opinion, except as to result.

APPEAL by the defendant, Isaac V. Brokaw, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of February, 1906, upon the verdict of a jury for \$10,000, and also from an order entered in said clerk's office on the 17th day of February, 1906, denying the defendant's motion for a new trial made upon the minutes.

Ambrose G. Todd, for the appellant.

Flamen B. Candler, for the respondent.

LAUGHLIN, J.:

The plaintiff was a coachman in the employ of Mrs. Jay. On the 21st day of November, 1900, at about four o'clock in the after-

noon, while driving her horses attached to a carriage down Fifth avenue, and when opposite the building at the southwesterly corner of Forty-fourth street and Fifth avenue, known as "Sherry's," he was struck by part of a skylight blown from the top of said building and sustained injuries to recover for which he brings this action against the owner of the premises.

Many objections to the recovery have been urged on the appeal, but in the view I take of the case it will only be necessary to consider three, which are: *First*. That the complaint is for negligence, and the plaintiff failed to establish a cause of action upon that theory. *Second*. That even if the complaint be susceptible of a construction that the action is brought upon the theory of nuisance, the defendant is not liable. And, *third*, if the action be maintainable for nuisance, but not for negligence, the jury were erroneously instructed.

First. I am of opinion that the complaint is sufficient to authorize a recovery upon the theory of nuisance. (*Campbell v. U. S. Foundry Co.*, 73 Hun, 576; *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 7 Misc. Rep. 374; *Moody v. Mayor*, 43 Barb. 282.) The question as to whether the action is for negligence or for nuisance becomes quite important on the facts in this case, and if it was submitted to the jury upon the theory of negligence the verdict cannot be sustained upon the theory of nuisance. (*Martin v. Petit*, 117 N. Y. 118.) It appears that the owner had parted with the possession of the premises, and that Louis Sherry had been in possession under leases since the 5th day of June, 1896; and while the owner reserved the right to inspect the premises, yet under the lease the duty devolved upon the lessee to make all necessary repairs and to indemnify the owner and save him harmless against "loss, liability or expense by reason of accident or injury to person or property occurring on said premises or the sidewalks thereof, or by reason of its use." The building from which the skylight was blown was constructed by the tenant under the first lease, pursuant to plans and specifications approved by the owner who, through an architect, supervised the construction; but it was paid for by the owner and became his property. It was finished on the 1st day of September, 1898, and from that day the possession of the tenant was under a second lease which was executed concurrently with the

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first and contained the provisions to which reference has been made, and he continued in possession thereunder until after the accident. It thus appears that the owner had been out of possession of the premises for nearly four years and six months under the successive leases to Sherry, who had occupied them during that time; and that the owner had been out of possession of this completed building upwards of two years. As Mr. Justice INGRAHAM observed in his concurring opinion on the former appeal herein (77 App. Div. 316): "The rule *res ipsa loquitur* applies, and from the incident itself the jury are authorized to infer negligence." (See *Mullen v. St. John*, 57 N. Y. 567; *Breen v. N. Y. C. & H. R. R. Co.*, 109 id. 297; *Griffen v. Manice*, 166 id. 188.) It may well be also that it would be presumed in the first instance that the owner was in possession of his real property; but when it is shown that he has lawfully passed the entire possession and control of his property over to a tenant, that rule no longer obtains. (See *Cross v. Koster*, 17 App. Div. 402; *Hexamer v. Webb*, 101 N. Y. 377.) If the owner were in possession, it might not be very material whether the complaint proceeds upon the ground of negligence or nuisance, because if he were negligent, that would imply that the building had been in an unsafe and dangerous condition for such a length of time that he should have known or discovered it and have made the necessary repairs before the accident; and if the building had been thus negligently permitted to remain in a dangerous condition, it would doubtless be a public nuisance to those lawfully using the public streets. The case would then become quite analogous to the coal hole case, where the opening was duly authorized, and, therefore, not a nuisance, but through failure of the landlord or tenant to keep it in proper repair, it became a nuisance, in which case the facts constituting the negligence are the facts creating liability for nuisance. (*Clifford v. Dam*, 81 N. Y. 52.) It is manifest, however, that where, as here, the owner has lawfully parted with the entire possession of the building and the same has been in the exclusive possession of his tenant for a long time prior to the accident, the negligence which may be inferred under the rule *res ipsa loquitur* could not relate back to the possession of the landlord. (See *Edwards v. N. Y. & H. R. R. Co.*, 25 Hun, 634; *affd.*, 98 N. Y. 245.) In such case, if the owner is liable at all, it is only upon the theory of nuisance. If the building was not a nui-

sance, that is, in a condition to endanger the traveling public or adjacent property, or those lawfully thereon, at the time the defendant surrendered *entire* possession thereof to his tenant, he would not be liable if thereafter, by the act of the tenant or through his negligent omission to make repairs, they became dangerous and unsafe, but in such circumstances the tenant would be liable. (*Washington v. Episcopal Church of St. Peter's*, 111 App. Div. 402; *Papazian v. Baumgartner*, 49 Misc. Rep. 244; *Ahern v. Steele*, 115 N. Y. 203; *Edwards v. N. Y. & H. R. R. Co.*, *supra*; *Miller v. Woodhead*, 104 N. Y. 471; *Miller v. N. Y., L. & W. R. R. Co.*, 125 id. 118; *Odell v. Solomon*, 99 id. 635; *Lansing v. Thompson*, 8 App. Div. 54; *Thomp. Neg.* [2d ed.] § 1155.) It follows logically, therefore, that the owner cannot be liable upon the theory of negligence in not keeping the building in repair during the time the tenant was in exclusive possession. He would be liable, however, upon the theory of nuisance if he leased the premises and surrendered his possession with a nuisance thereon which he had created or of which he had either actual or constructive notice, or if he retained possession in part. (*Swords v. Edgar*, 59 N. Y. 28; *Eakin v. Brown*, 1 E. D. Smith, 36; *Ahern v. Steele*, 115 N. Y. 203; *Timlin v. Standard Oil Co.*, 126 id. 514; *Walsh v. Mead*, 8 Hun, 387; *McGrath v. Walker*, 64 id. 179; *Matthews v. De Groff*, 13 App. Div. 356; *Campbell v. U. S. Foundry Co.*, 73 Hun, 576; *Trustees of Canandaigua v. Foster*, 156 N. Y. 354.)

The complaint must, therefore, be examined to ascertain whether it sounds in negligence or in nuisance. The plaintiff alleges that the defendant was the owner of the building; that divers structures had been erected on the roof of the building "for some considerable time before and up to and at or about the time the plaintiff suffered the injury," and that they "were negligently, carelessly, dangerously and improperly made and constructed, in that the roofs thereof were improperly and . * * * insecurely fastened to the said structures, and in that the bricks of the said structure were improperly and insecurely laid with a poor and inferior quality of cement or mortar, so that the said roofs and bricks of the said structures were in an unstable and dangerous condition and liable to be blown off the roof of the said building;" that the attention of the defendant had been frequently called "to the dan-

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gerous condition of the said structures and to their faulty construction, and to the danger of the bricks and roofs thereof falling upon passersby on Fifth avenue in front of the said building, but the defendant negligently and carelessly neglected and refused to alter or repair the said structures or to properly secure the same, and the roofs thereof, to the said structures, and the said defendant, well knowing the premises, negligently and carelessly permitted and allowed the said structures and the roofs thereof to be and remain in an improper, insecure and unsafe condition ;" that on the occasion in question, the roofs of said structures, or one of them, and the bricks, mortar and other building material used in the construction of the said structures, or one of them, were blown from the roof of the building "through the carelessness and negligence of the defendant in allowing and permitting the said structures so erected on the roof of the building as aforesaid, to be and remain in said improper, unsafe and insecure condition as aforesaid, and in allowing and permitting the roofs thereof to remain improperly fastened to the said structures after he had been notified of the dangerous condition of the said structures and the roofs thereof, as aforesaid." I am of opinion that these allegations are sufficient to authorize a recovery on the theory of nuisance. It is not necessary to *expressly* charge that the defendant created or maintained a nuisance. (*Coon v. Froment*, 25 App. Div. 251; *Campbell v. U. S. Foundry Co.*, *supra*; *Lafin & Rand Powder Co. v. Tearney*, 131 IH. 322; *Sullivan v. Waterman*, 20 R. I. 372.) Under our system of pleading, if the essential facts are stated, it is not imperatively required that they should be characterized, although it is better to characterize them, for that tends to remove doubt as to the pleader's theory. In some instances, as already observed, a recovery might be had upon either theory, and the difference between nuisance and negligence is not very plainly marked. A structure or business may be lawful, and yet become a nuisance through negligence in the maintenance or use thereof. (See *Dunsbach v. Hollister*, 49 Hun, 352; *affd.*, 132 N. Y. 602; *Clifford v. Dam*, *supra*.) A nuisance in many, if not in most, instances, and especially with respect to buildings or premises, presupposes negligence. The existence of a nuisance on one's premises does not conclusively establish his liability therefor, regardless of whether or not he is in possession and control thereof. If

he did not create the nuisance or *knowingly* maintain it, he is not liable. (*Ahern v. Steele, supra*; *Finkelstein v. Huner*, 77 App. Div. 424; *affd.*, 179 N. Y. 548.) Of course, if he created or participated in the creation of the nuisance, or in maintaining it, his conduct in so doing might be characterized as negligent and perhaps also as unlawful. (See *Finkelstein v. Huner, supra*.) Where liability for the nuisance is predicated upon the omission of the owner to abate the nuisance, rather than upon his having created it, then it is clear that negligence is involved. It has often been held by the courts that it is unnecessary to prove negligence where an action is brought for nuisance, and that the exercise of ordinary care is no defense (*Clifford v. Dam*, 81 N. Y. 52; *Sexton v. Zett*, 44 id. 430; *Irvine v. Wood*, 51 id. 224; *Creed v. Hartmann*, 29 id. 591; *Lamming v. Galusha*, 135 id. 239); but that is not a universal rule, and obtains only when the nuisance is the result of an unauthorized or unlawful and wrongful act, as, for instance, opening a public street without authority. The plaintiff makes out his *prima facie* case by showing the nuisance and either that it was created by the defendant or existed in such manner that he is chargeable presumptively with knowledge thereof. If the defendant created it or participated in the creation of it, his liability is absolute; but if the charge be that he merely maintained it, then he may show that he did not create or discover it, and it could not have been discovered by the exercise of reasonable care; but of course he may not exonerate himself upon the theory of care in maintaining a nuisance of which he knew, because it would be his imperative duty forthwith to abate it. In many instances it is essential to allege in some form that the act was unlawful in order to warrant a recovery upon the theory of nuisance, as, for instance, where a public street or place has been interfered with by placing an obstruction therein, or opening or undermining the surface thereof without obtaining a permit from the public authorities having control of the street, and in such case the liability is absolute as matter of law unless the defendant pleads and proves a license and due compliance with its conditions, or doing any other act without a license or permit where one is required. Here, however, the claim is not that the building was erected without a permit or the approval of the public authorities, but that it was improperly constructed or became an unsafe

structure when completed. The claim is not that it was not a lawful structure in the sense that it was constructed in violation of law, but that it was an unsafe structure. The plaintiff does not merely charge a defective condition at the time of the accident owing to negligence in keeping it in repair, but he alleges in effect that the structure upon the roof which blew off and injured him was not properly constructed or attached to the roof originally. If these allegations be true, it was a nuisance and a recovery might be had upon that theory, notwithstanding the fact that the plaintiff characterizes the failure of the defendant to properly construct and attach the structure as negligence, and the subsequent maintenance thereof as negligence.

Second. We come now to the question as to whether the plaintiff could, in any view of the evidence, sustain his action upon the theory of nuisance, and whether it was tried and submitted to the jury upon that theory. The plaintiff, on his affirmative case, presented no evidence as to the actual condition of the skylight from which he received the injury, or as to the manner in which it was constructed or attached to the roof. He rested upon the doctrine *res ipsa loquitur*. Where that rule applies, the fact of the accident and the attendant circumstances, without further proof of the cause, warrant the inference of negligence; but it is doubtful whether they alone would warrant the inference of such a negligent condition as would constitute a public nuisance, although in *Vincett v. Cook* (4 Hun, 318) the court appears to have been of opinion that they do. The decision of the question, however, was not necessarily involved in that case, nor is it, I think, in this, for here, at least, the owner was not in possession. The learned counsel for the plaintiff upon the trial insisted from the outset that he was proceeding upon the theory of nuisance. After the plaintiff rested the defendant offered evidence tending to show that the plans had been prepared by competent architects; that the contract had been let to competent builders; that the work had been performed in accordance with the plans and under the supervision of a competent superintendent, and that the building was constructed under the lease while possession was in the lessee. The plaintiff then, in rebuttal, presented evidence showing that the skylight, which consisted of a

heavy copper or iron framework and glass, weighing between 1,200 and 1,500 pounds, covered an elevator shaft which projected eight feet above the roof, the dimensions of which were twelve by eight feet, and rested on brick walls inclosing the elevator shaft, *and tending to show* that the skylight was not directly attached to the roof, but only to the brick walls by iron rods or bars one inch in width and one-quarter of an inch in thickness, extending down about eighteen inches or two feet on the inside of the walls, and about one inch of the lower ends being bent outward and projecting into the brick walls, and that this was not a proper construction, but that the skylight should have been bolted to the roof.

The evidence tends to show a very unusual condition of the weather and a most severe storm at the time of the accident; that the temperature ranged from seventy to seventy-two degrees between two and four o'clock that afternoon, which was the highest for that day of the year in the history of the weather bureau, which dated from 1872, and that between four and six o'clock there was a rapid fall in temperature to sixty-two degrees at five o'clock; that there was a high wind at the average rate of thirty-five miles an hour from two to three o'clock; of thirty-four miles an hour from three to four o'clock; of forty-seven miles from four to five o'clock, and a gale of fifty miles an hour from five to six o'clock; that during the five minutes ending at four-fifteen p. m. the wind attained a velocity of seventy-three miles an hour; that it grew very dark for that time of day; that it was raining at the time of the accident, and the rain commenced at the Broadway weather bureau station at four-nine p. m. The records of the weather bureau did not show the velocity of the wind at precisely four o'clock, but the fair inference is that the accident occurred at about the time when the wind attained its highest velocity and just as or after the storm reached that point. The highest wind ever recorded in the weather bureau for New York and vicinity was eighty-three or eighty-four miles an hour. The court submitted it to the jury to determine whether the storm was of such unusual violence that the defendant, in constructing the building, was not obliged to foresee and guard against the danger incident thereto. I am of opinion that this was a question of fact for the jury although the case is not strong on the question of defective con-

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struction of the building such as would make it a nuisance if the wind attained or nearly attained hurricane velocity. It is the duty of those constructing buildings in close proximity to the public street to exercise reasonable care to construct them with such safety and security that they will withstand any storm or wind that reasonably prudent men familiar with weather conditions in the locality would anticipate might occur. (*Vincett v. Cook*, 4 Hun, 318; *Haack v. Brooklyn Labor Lyceum Assn.*, 93 App. Div. 491.) But of course they are not insurers against their building blowing or falling into the street from a storm of hurricane velocity or from an earthquake. The enforcement of these rules of law is essential alike to the safety of those using the public streets and to the protection of the rights of owners of property.

The court, in submitting the case to the jury, did not expressly submit it upon the theory of nuisance and frequently used the word "negligence" in speaking of the claims of the plaintiff and of the duty of the defendant. But the court in this regard merely followed the complaint and very clearly instructed the jury that unless the skylight was improperly constructed and insecurely attached to the building originally, the defendant would not be liable. The case was, therefore, in effect submitted to the jury upon the theory of nuisance.

The learned counsel for the appellant urges that the defendant is not even liable for nuisance, because the building was constructed, not by him, but by his tenant, who was in possession. As has been seen, the rule is well settled that a landlord who leases his premises with a nuisance thereon remains liable therefor. There is another rule, equally well settled, that every one who creates a nuisance or participates in the creation or maintenance thereof is liable for it, even though the work was done by an independent contractor. (*Deming v. Terminal Railway of Buffalo*, 169 N. Y. 1; *Hawke v. Brown*, 28 App. Div. 37; *Duerr v. Consolidated Gas Co.*, 86 id. 14; *Coon v. Froment*, 25 id. 251; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 185; *Weber v. Buffalo R. Co.*, 20 App. Div. 293; *Creed v. Hartmann*, *supra*; *Wood Nuis.* [2d ed.] § 114.) If the skylight when constructed was a nuisance, owing to the fact that it was not safely attached to the building, I am of opinion that the owner would be liable. It is not a case

of following plans which competent experts advised were safe, and while the owner did not possess special knowledge sufficient to judge for himself, in which case probably he would not be liable (*Fox v. Ireland*, 46 App. Div. 541; *Burke v. Ireland*, 166 N. Y. 305; *Duerr v. Consolidated Gas Co.*, *supra*; *Ugglav. Brokaw*, 77 App. Div. 310), neither the plans nor the specifications contain a definite requirement with respect to the manner in which the skylight should be attached. The only requirement was that it should be *safely* attached. Neither side presents evidence clearly showing how it was secured to the building or roof, or who determined the matter. It cannot be decided upon this record whether it was so attached that a person of ordinary intelligence, without special knowledge or training, should have known whether it was unsafe or whether an owner would have been obliged to rely on that point upon experts specially skilled in such matters, and whether he did in such manner and to such extent that he would be relieved from the charge of personal negligence in knowingly participating in the creation of a nuisance, assuming that to be a defense. It is unnecessary to discuss at length the various provisions of the leases. They were both made on the same day. Under the first, the tenant was to remove the old buildings, prepare plans and specifications for the construction of the new building, which were to be approved by the owner, and to advertise for proposals for the construction thereof and make a contract in his own name, the entire expense, however, to be paid by the owner, and the tenant to pay in addition to an agreed annual ground rental, five per cent per annum on the entire cost of construction. The second lease was of the building when completed for a period of twenty-one years, with a privilege of two renewals for a like period, the rental being as contemplated in the first lease. The tenant took possession under the first lease and continued in possession, without surrendering possession at the expiration of the first lease and taking possession under the second. The agreement under which the building was erected expressly provided that it was to be and to become the property of the defendant. An owner may, of course, rent his premises and consent that the tenant may erect buildings thereon which shall become the property of the landlord, and if the latter reserves no control or supervision over the work, he will not be responsible either for the negligent acts of the

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tenant or his contractor or the employees of the latter, either during the construction or for the safety of the plan or for damages subsequently occasioned by the collapse of the building while he is thus out of possession. Here, however, the owner reserved, to a certain extent, control with respect to the plan and the construction of the building thereunder. If a nuisance was created thereby on his own land, he participated therein. He not only authorized the erection of the building, but he approved the plan under which it was erected, supervised its erection, approved the completed structure, and paid the bills. He cannot, therefore, escape liability, if when erected it became a public nuisance.

Third. I am of opinion, however, that the judgment must be reversed, for an error in the charge. It is manifest that upon the theory of a nuisance the burden was upon the plaintiff to show that this skylight was not originally securely attached to the building, and that the inference authorized by the rules *res ipsa loquitur* would not establish, even *prima facie*, that the building was a nuisance when constructed. The learned trial judge on this point apparently lost sight of the fact that the plaintiff was claiming a right to recovery upon the theory of nuisance, and charged the rule of law applicable in an action for negligence. The jury were instructed that the fact that part of the skylight blew into the street raised the presumption that it was not properly secured, and that it was the duty of the defendant to meet this presumption by proving affirmatively that it was securely fastened. The learned counsel for the defendant duly excepted to this part of the charge, and I am of opinion that the exception was well taken. Since, as has been seen, the action cannot be maintained against the owner upon the theory of negligence, upon which theory alone the charge of the court would have been proper, it is manifest that the jury may have been misled upon this very vital point. There was a conflict in the evidence as to the manner in which the skylight was attached. The evidence on the part of the defendant, if believed by the jury, would have warranted them in finding that it was securely fastened, and that it gave way only owing to the extraordinary violence of a gust of wind which the exercise of reasonable care would not have required the defendant in the construction of the building to have anticipated or guarded against. The burden of proof on this point, therefore,

became very important, and the jury should have been instructed that it rested with the plaintiff.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

PATTERSON, P. J., and HOUGHTON, J., concurred.

SCOTT, J. (concurring):

I concur in the reversal of the judgment, although not precisely for the reasons stated by Mr. Justice LAUGHLIN.

In the first place I consider that the complaint states a cause of action for negligence and nothing else. It was upon that construction of the complaint that the sufficiency of the defenses were considered upon the former appeal to this court (77 App. Div. 310), and the cause was tried and submitted to the jury as an action for negligence.

But whether considered as an action for negligence or for a nuisance the plaintiff did not show any facts entitling him to a judgment against the defendant. It was clearly shown that defendant neither built nor occupied the building. He owned the land upon which it was erected and he leased the land to one Sherry before the erection of the building was commenced, under a separate agreement that Sherry should erect the building and that defendant should pay the cost thereof. The only negligence charged, or attempted to be proven, is that one of the skylights upon the roof of the building was not fastened to the walls upon which it rested as securely as it might and should have been fastened, and the claim is that this constituted negligence for which defendant is liable. In effect, the attempt to charge the defendant on the theory of nuisance is based on the same charge of negligence. A nuisance erected upon private property must be something inherently dangerous, and constructed and maintained in violation of the safety of others, or as stated by Judge EARL, "an unreasonable, unwarrantable or unlawful use of (one's own premises), so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor." (*Campbell v. Seaman*, 63 N. Y. 568.) A skylight upon the roof of a building is not *per se* unreasonable, unlawful or unwarrantable, and it cannot, therefore, be considered a nuisance even if likely to become dangerous, unless there be proof of negligence either in its construction or

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maintenance. (*Lossee v. Buchanan*, 51 N. Y. 476; *Cosulich v. Standard Oil Co.*, 122 id. 118.) It follows that in order to sustain a recovery against the defendant upon any theory it is necessary to convict him of negligence and as he has never been in possession of the building that negligence must be found with respect to the original construction of the skylight. It is sought to be found in the insecurity of the fastenings, and the question of defendant's liability, therefore, resolves itself into the question whether or not he is to be held to have been negligent in not discovering and preventing the use of an insecure means of fastening the skylight to the roof. Under the contract between defendant and his tenant Sherry, I much doubt if the former can be considered as the person who erected the building. He neither selected nor employed the architects and contractors engaged in its erection. The plans were subject to his approval, but it is not claimed that they were improper or defective, and the method of securing the skylight was a minor detail of construction not shown on the plans. The defendant is not to be held liable merely because he employed an architect, for his own protection, to see that the structure was erected according to the plans (*Weber v. Buffalo R. Co.*, 20 App. Div. 292; *Duerr v. Consolidated Gas Co.*, 86 id. 14), nor because he paid the cost of the building.

In *Miller v. N. Y., L. & W. R. R. Co.* (125 N. Y. 118) the lessee of the land built an embankment so negligently that the sand and debris were washed down upon plaintiff's land to his injury. The cost of erecting the embankment was paid for by the lessor.

In an action against the latter it was said, as might well be said of the present case: "The lessor cannot be made liable for these damages because it was bound under the lease to issue to the lessee its bonds for the cost of any work chargeable to construction. The work was nevertheless the work of the lessee. It did the work in its own way and the lessor had no control thereof. In doing the work, the lessee was in no way working under the lessor, and in reference thereto, the lessor was in no way the superior of the lessee in such a sense that it was bound to respond for the acts of the lessee."

Even if defendant were to be regarded as the person who erected the building, still no case was made imputing negligence to him.

The method of fastening the skylight was, as has been said, a minor detail of construction, of any defect in which it is not claimed that defendant had knowledge or notice, and of the general competency and skill of the architects and contractors no question is raised.

For their default in the method of doing the work the defendant is not liable. (*Burke v. Ireland*, 166 N. Y. 305.) Upon no ground, therefore, can negligence be charged against the defendant, and, since he is not chargeable for erecting a nuisance, unless he was guilty of some negligence in respect of it, the action against him must fail under any construction of the complaint, which should have been dismissed.

McLAUGHLIN, J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event. Order filed.

BENJAMIN PATTERSON, Respondent, v. JOHN H. WOODBURY
DERMATOLOGICAL INSTITUTE, Appellant.

First Department, February 8, 1907.

Costs — recovery of less than \$500 in Supreme Court, New York county — offer of judgment — when defendant entitled to costs from time of offer.

The purpose of subdivision 5 of section 3228 of the Code of Civil Procedure, denying costs to a plaintiff bringing action in the Supreme Court in the counties of New York and Kings unless he recover \$500 or more, was designed to discourage the bringing of actions in the Supreme Court which might be tried in the City Court. Although the latter part of said subdivision provides that the fact that in any action the plaintiff is not entitled to costs thereunder shall not entitle the defendant to costs under the following section, it is not thereby intended to deprive the defendant of costs merely because the plaintiff is not entitled to costs by reason of his failure to recover \$500.

Thus, when in an action in the Supreme Court in said counties the defendant has made an offer of judgment not accepted and the plaintiff at trial recovers less than the offer and less than \$500, the plaintiff is not entitled to tax costs accruing prior to the offer of judgment.

Moreover, since the plaintiff failed to accept the offer of judgment and failed to recover a judgment more favorable than the offer, he is not entitled to costs from the time of the offer, but is required to pay the costs to the defendant from that time.

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APPEAL by the defendant, John H. Woodbury Dermatological Institute, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of November, 1906, as denies the defendant's motion for an order directing the clerk of the Supreme Court to tax the costs in this action in favor of the defendant, and also from an order entered in said clerk's office on the 12th day of December, 1906, resettling said order.

William W. Pellet, for the appellant.

Benjamin Patterson, for the respondent.

LAUGHLIN, J.:

The action was brought in the Supreme Court, county of New York, to recover the sum of \$761 for services. With its answer to the amended complaint the defendant served an offer of judgment for \$313.85, together with interest thereon and the costs of the action. Upon the trial of the action the plaintiff obtained a verdict for only \$279.35. The offer of judgment was filed and by consent of the parties an entry was made in the minutes of the trial that it had been duly served and had not been accepted. On the taxation of costs the plaintiff claimed the right to tax the costs prior to the offer of judgment. This was opposed by the defendant upon the ground that subdivision 5 of section 3228 of the Code of Civil Procedure precludes the recovery of costs by the plaintiff in such case in the counties of New York and Kings. The recovery having been for less than \$500, inclusive of costs, it is quite clear that the plaintiff was not entitled to costs. The object of the provision depriving the plaintiff of the right to recover costs in such cases was to discourage the bringing of actions in the Supreme Court which might be brought in the City Court. The last sentence of said subdivision is as follows: "The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section." Section 3229, which is the section referred to as the next following section, provides that the defendant is entitled to costs, of course, in an action specified in the preceding section unless the plaintiff is entitled to costs as therein prescribed.

The learned counsel for the plaintiff contends that the purpose of the last sentence of subdivision 5 of section 3228 was to preclude the recovery of costs by a defendant in such a case. This is not the proper construction of these statutory provisions. Were it not for the last sentence in said subdivision 5 the defendant would have been entitled by virtue of the provisions of section 3229 to costs as matter of course, even though it had not made any offer of judgment and although the plaintiff had recovered in the action. It is manifest that the Legislature, while intending to deprive the plaintiff of the right to recover costs in such case, did not intend that the defendant should be entitled to recover costs merely because the plaintiff was precluded from recovering them. There is no basis for a legislative intent to deprive a defendant of the right to costs merely because he has been brought into the Supreme Court against this will when he might have been sued in the City Court.

The plaintiff selected the forum, and the defendant had no voice in the matter, and was bound to accept the election made by the plaintiff. The construction for which the plaintiff contends would, if carried to its full extent, deprive the defendant of the right to costs in such case, even though he recovered. The language of the provision is that "the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more." If the verdict should be for the defendant, the plaintiff would not recover \$500 or more; and, therefore, literally, according to the plaintiff's contention, the defendant would not be entitled to costs. There was no intention to punish the defendant on account of the forum in which he is sued. It was necessary to insert the last sentence of said subdivision 5 to prevent a recovery of costs by the defendant under section 3229 where no offer of judgment was involved, and where the plaintiff succeeded, but merely failed to recover \$500, or more. Since the defendant did not recover in this case, its rights to costs depend upon the provisions of section 738 of the Code of Civil Procedure, which regulate costs where there is an offer of judgment. By virtue of the provisions of that section, the plaintiff, having failed to accept the offer, and having failed to recover a more favorable judgment than that offered, was precluded from recovering costs from the time of the offer and was required to pay costs to the defendant from that time.

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It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs. Order filed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. PHILIP
WEINSEIMER, Appellant.

First Department, February 15, 1907.

Crime — extortion by president of labor union — evidence.

The defendant, the president of a labor union, was convicted under sections 552, 553 and 554 of the Penal Code for extorting money from a contractor under the threat of continuing a strike after all controversies with the labor union had been settled. Evidence considered and judgment of conviction affirmed.

A threat by the president of a labor union, who has control of the action of the members, to continue a strike after all legitimate differences have been settled unless the contractor gives a certain sum of money to the defendant is a threat to do unlawful injury to property within the meaning of the statute.

Although there is no evidence of the specific amount of damage which would have been sustained if the complaining witness had refused to comply with the threat, the conviction may be sustained if it appear that he would have sustained damage, and the failure to show the amount thereof does not require a reversal.

Neither is it material whether the contract of the complaining witness with the owner was what it purported to be or whether the owners were themselves to furnish the material and the complainant was merely paid for superintending the work, as upon either theory he would have sustained damage.

Neither is it material whether the money which the complaining witness delivered to the defendant was his own or the money of the owners for whom he acted as agent. In such action it is not a question as to whose money was extorted by the defendant, but whether he received it from the complainant.

Evidence that prior to the offense charged the defendant threatened to call a strike on the same building when the work was in the hands of another contractor unless money were paid to him is admissible to show intent to do unlawful injury to the complainant's property and to show a previously conceived plan to commit the crime. Such evidence shows that the purpose and plan were directed toward "the contract work," the threat to the former con-

tractor being so closely connected in time and similarity of circumstances as to indicate that the demands and threat constituted a step in a preconceived plan and purpose which culminated in the crime.

It is not error to refuse to charge that the jury cannot consider the statement of the former contractor that the defendant asked him for money as corroborative of the testimony of the complaining witness, when no request is made that the jury should be instructed that the evidence should be limited to the question of motive and intent, especially so when the court subsequently charges that there is no direct testimony corroborating the statement of the complaining witness that he was asked for money at the date of the extortion.

APPEAL by the defendant, Philip Weinseimer, from a judgment of the Court of General Sessions of the Peace in and for the county of New York, rendered on the 14th day of November, 1904, convicting the defendant of the crime of extortion.

Mann Trice, for the appellant.

Robert C. Taylor, for the respondent.

LAUGHLIN, J. :

The charge upon which the defendant was convicted is, in effect, that on the 31st day of December, 1903, he, then being president of a labor union, obtained from one George J. Essig the sum of \$1,000 in money and seven promissory notes, aggregating \$1,700, by fear induced by a threat made to Essig, who had a contract for the plumbing work on "The Chatsworth" apartment house on Seventy-second street, near Riverside Drive, owned by the Johnson-Kahn Company, that unless said sum of money and notes were delivered to the defendant work could not be resumed on the contract, the men at that time being out on a strike.

The provisions of the Penal Code under which the indictment was found and conviction had are sections 552, 553 and 554. Section 552 defines extortion as follows: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Section 553 defines "what threats may constitute extortion," so far as material to the appeal, as follows: "Fear, such as will constitute extortion, may be induced by a threat: 1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family." Section 554 provides that "a person who extorts any money or other property from another,

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under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding five years." Section 561 of the Penal Code, contained in the same chapter* with the sections already quoted, provides that "it is immaterial whether a threat, made as specified in this chapter, is of things to be done or omitted by the offender, or by any other person."

The defendant was president of Plumbers' Local No. 2 of the city of New York, which was composed of journeymen plumbers. There was also an organization of master plumbers, known as the Master Plumbers' Association. There existed between the two associations an agreement by which the members obligated themselves to work for and employ only members of the respective associations. The contract for the plumbing work on this apartment house had been first let to one Rendall, who was not a member of the Master Plumbers' Association, but who employed on the work about twenty-two plumbers who were members of defendant's union. George F. Johnson, who was president of the Johnson-Kahn Company, was called by the People and testified, in substance, that on or about the 4th day of November, 1903, a man who called upon him professing that the object of his visit was in regard to an "advertisement in a plumbing journal," disclosed his real purpose to be to inform him that a strike was threatened on the building and to arrange a meeting between him and one Selly as "a man who could probably help me out;" that up to this time the company had heard nothing of a threatened strike, but that he was persuaded there was something to it and arranged to meet Mr. Selly the next day; that on being introduced to Selly by the alleged canvasser the next day, Selly said he wanted to introduce him to "somebody," and without disclosing who the "somebody" was or discussing the threatened strike, made an appointment for the following day, at which time he introduced him to the defendant, thereupon leaving them together in Bryant Park; that the defendant then said he was going to call a strike on the building because the owners were "lumping the job" and the contractor was not a member of the Master Plumbers' Association. It seems that the term "lumping" is used to designate a method of doing work where the contractor is only the figurehead for the owner,

* Penal Code, tit. 15, chap. 5.—[REp.]

who purchases the material and assumes all the responsibility in connection with the contract, and the "lumper" merely furnishes the labor and acts as superintendent upon an agreed compensation for his services. Johnson further testified that he denied that the company was "lumping" the contract, and undertook to convince the defendant, who said: "Well, you know we do not have to prove that to anybody but ourselves;" that he suggested he would ask Rendall to join the association, to which the defendant replied, "Well, there is a big likelihood that he won't get in," and then said, "I can fix this matter for you, though;" whereupon the witness asked, "How can you fix it?" and the defendant said, "Well, it will cost you some money; you are making considerable out of this job, doing it the way you are, making \$10,000, and you ought to give me at least \$2,500;" that he informed defendant that that was out of the question and he did not think the company would give anything, but suggested that after the work was completed, if the company should have no trouble with strikes, it would make the defendant a present of \$500, to which the defendant answered that that would not be cigar money for the "bunch" and that he was representing some people down town, and that his union and the boss plumbers had a working agreement, and that there was some one else who had to come in on the "divide," and upon the witness saying, "All right, Mr. Weinseimer, then that ends it," the defendant said, "Well, you had better think it over and meet me here in a week," which the witness promised to do; and that during this conversation the defendant informed the witness that he was president of the union. The defendant admitted that he had an interview with Johnson at the time and place specified, but claimed that he came on Selly's invitation, who introduced Johnson as a subscriber, who wished to talk with the defendant; that Johnson brought up the subject of the trouble and spoke of Rendall not being a member of the association and of desiring to have him join, and apparently as an inducement to obtain the defendant's influence manifested a willingness to give him valuable information concerning the races, and he denied that there was any talk concerning the \$3,000 or \$2,500, as testified to by Johnson. Johnson further testified that he met the defendant again in Bryant Park a week later and declined to submit to his demand, but

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renewed his offer to give him \$500 if there should be no strike, to which the defendant replied that that was no proposition at all, and if the witness would make him a moderately liberal proposition he might talk business, and on parting the defendant said, "There is no need of being bad friends, when you do get in trouble up there, you can call me up if you like," and he gave the witness his telephone number. The defendant admitted this meeting also, but testified that Johnson requested his assistance in getting Rendall into the association and said to defendant, "If there is any way that you can arrange this matter, if you can see that this man was admitted, and there would be no trouble on the job * * * I will make you a present of \$500," to which the defendant says he replied that there was nothing he could do, *but that if Johnson wanted to make him a present, he could not very well stop him*, and he denies that there was any talk on this occasion about the \$3,000 or \$2,500. This last interview was on or about the thirteenth of November, and on the sixteenth the strike was ordered and the men left work. It is conceded, however, that the strike was duly ordered in accordance with the rules and regulations of the union. The court instructed the jury that the evidence was insufficient to warrant them in finding that the defendant "took any part improperly" in bringing it about. After the men struck and before Essig obtained the contract, the union passed a resolution declaring that it was "the sense of this organization that the men taken out of the shop of Rendall are entitled to waiting time." The owners then entered into a contract with Essig to do the plumbing work. The contract was signed on the 21st day of December, 1903. Essig attempted to commence work the next day, but was informed by Alwater, a delegate of the union, that the men were entitled to "waiting time," which would have to be paid before they resumed their work, but Essig was permitted to do a small repair job and was allowed two men who worked on that day. The court instructed the jury that the demand for waiting time was made by order of Local No. 2 and that the defendant was not responsible therefor. On December twenty-third Essig saw one Finn, another delegate of the union, who also informed him that the "waiting time" would have to be paid before the work could be resumed. Essig informed the delegates that he was willing to pay the "waiting time" and wanted

to know how much it was. The delegates said that they did not know but would ascertain and inform him. Essig saw no one connected with the work from December twenty-third until December twenty-eighth, when he met Alwater who told him that he had been unable to find out how much the "waiting time" was or to whom it was due. Essig then asked if there was any way to get the privilege of the floor at their association, and Alwater said he would ask the president. On that evening Essig went to the meeting of the union and was introduced to the defendant, who was president, by Alwater. He was desirous of starting the work the next morning, and for the purpose of paying the waiting time he had a certified check in his pocket for \$1,000. He asked the defendant for the privilege of the floor, which was refused, and the defendant said that he was too busy to talk with him, but to come around to his office the next day at twelve o'clock, at which time he would see him. It is undisputed that Essig and the defendant had an interview on the twenty-ninth of December. Essig testified that he met the defendant on that day pursuant to appointment, and that they went into a cafe and sat down in one of the booths, whereupon defendant asked to see his contract and he exhibited it to him, at the same time informing him that the job amounted to about \$22,000; that he then asked defendant, "Why are you holding my men up," to which the defendant answered, "Waiting time that is due on the job has got to be paid to the men that were pulled out on it with Rendall," to which the witness answered, "I am perfectly willing to pay them and have been," but that he did not know the amount or the names, and asked defendant for that information, to which defendant replied, "I will have the delegates find that out, but that is not in a hurry, anyway;" that the witness then said, "If that is not in a hurry I would like to start the job immediately, and I will leave the check right up with you;" that the defendant then said, "Now, you ain't in the plumbing business for your health, but to make money, and I ain't running the labor end of it for the love of it either. Now, * * * you have got a \$40,000 contract here and will make about \$15,000. What I want is \$3,000, and if you don't give it to me, you nor any other son of a bitch will start that job." Later on the witness was asked, "When Weinseimer told you that unless the \$3,000 were paid neither you nor any other son

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of a bitch could go to work on that job, did you believe him?" and he answered, "I did." The witness further testified that he asked the defendant how he wanted the money, to which the defendant answered, "I will take \$1,000 down; I won't take a check; they will never catch me the way they caught Mr. Parks; the balance we will settle later;" that the witness said he would think over the matter, and the defendant asked how long he wanted to think it over, and on being informed that he wanted until the following day, replied, "You meet me at my office, 95 Nassau street, between twelve and one," and gave the witness his telephone number and instructed him to telephone in case he could not come down, so that he, the defendant, would not waste his time. The defendant's version of this interview was that Essig called to assure him of the fact that he had received the contract for this work and that it was legitimate, and to ascertain if it was satisfactory to the defendant, and was informed that the Master Plumbers' Association was the organization to decide whether the contract was right, and that his union had no grievance, except that it required that the "waiting time," should be paid and he referred Essig to the delegates Finn and Alwater to ascertain the amount and to whom it was payable, and he denied that he made any demand for money. Essig, in rebuttal, denied the defendant's version of the interview and further testified that he met the defendant on the thirtieth of December, pursuant to the appointment; that after sending the stenographer out of the room the defendant asked him what he had decided to do and was informed that he had decided to pay, but thought the amount was too much, and that \$2,500 was enough, to which the defendant replied that he could not take \$2,500; that "I have got to divide it up with other people and the least I will take is \$2,700;" that he then told defendant he would pay it, and that in answer to an inquiry the defendant said he would take \$1,000 down and the balance in seven notes payable at Essig's shop, made out in blank with respect to the name of the payee, the first for \$200 and the other six for \$250 each, payable respectively on the tenth day of each successive month, and the defendant asked when he would be ready to pay the money and was informed at "any time," whereupon defendant asked the witness to meet him at

the same place the next day ; that the witness then asked the defendant if he could start the job, to which the defendant replied, "No that ain't in a hurry ; you meet me at the appointed time to-morrow," which the witness promised to do. The defendant denied that he had any conversation with Essig on that day. After the interview with the defendant on the thirtieth of December Essig went to the office of the company and informed the treasurer that he was to pay the defendant \$1,000 in cash and give him seven notes, and the treasurer filled out the notes in accordance with Essig's suggestions, which conformed to the directions of the defendant, and Essig signed them. Essig then surrendered to the Hamilton Bank the certified check, which on the twenty-eighth day of December he had drawn against the proceeds of a \$1,000 check received from the owners for the purpose of paying the "waiting time," and obtained \$1,000 in cash, and on the following day took the notes and cash to the defendant's office, between twelve and one o'clock, pursuant to the appointment, and according to his testimony delivered them to the defendant who counted the money and put it in his pocket and retained it and examined the notes and inquired the name of the witness' bank, and on being told that it was the Hamilton Bank said that he had changed his mind about having the notes payable at the witness' shop and requested that the witness make out seven other notes payable at the Hamilton Bank, leaving the name of the payee blank as before, and said that he would have an innocent party sign them and run them through the bank or that he might call the witness up and have him bring the money down to pay the notes which would be delivered as they fell due, to which the witness expressed assent, and then asked if he could start the work and the defendant said, "*All right, go ahead, I will notify the delegates that everything is all right,*" and the witness answered, "All right," and departed for "The Chatsworth." The defendant admitted that he had an interview with Essig on this day between eleven and twelve o'clock, but he testified that the conversation related to the "waiting time" of which Essig complained as excessive, and denies that he received the money or the notes and the conversation respecting the same. Before going to defendant's office on this day, Essig had been at the building and says in substance that two members of the union were there in the morning about nine o'clock,

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and five or six before eleven-thirty, but that they did not actually begin the work until after he paid the money to the defendant, although they were preparing to resume work before that hour, and that he had no further difficulty in starting the work satisfactorily; that he did not know who ordered the men to return to work, but that he had no talk with the delegates about the men returning to work at that time and had not sent for them, otherwise than his conversation with the defendant. Evidence was introduced in behalf of the defendant tending to show that some of the men resumed work in the morning, but that was controverted. After the work had been resumed and on the 4th day of January, 1904, Essig paid the "waiting time" which was upwards of \$900, and he testifies that on the next day he saw the defendant and delivered to him seven notes in all respects the same as those first prepared, with the exception that the place of payment was changed to the Hamilton Bank, which the defendant received and retained. The seven notes originally prepared and all but the last of the second set, which was not due until August tenth, were received in evidence, as were Essig's check book and the checks. One of the notes was payable on the tenth day of each month commencing with the tenth day of February. According to the testimony of Essig, about the eleventh or twelfth of February the defendant telephoned him under the name of Brown, but subsequently disclosed his identity, and asked if the witness could come down to meet the first note; that the witness replied that he would be down within a couple of days, and on the seventeenth of February he drew \$200 from the bank, the amount of the first note, and called upon and delivered it to the defendant, who put it in his pocket and retained it, and surrendered the note; that as each of the other notes, except the last, fell due or within a few days thereafter, he drew from the bank \$250 and delivered it to the defendant and received the note which it paid. The paying teller of the bank corroborated Essig with respect to the respective transactions with the bank. The defendant denied that the notes were ever delivered to him or that they were paid to him. He admitted, however, that Essig came to his office about four or five weeks after December 31, 1903, and testified that he did not see him again prior to the 17th day of August, 1904, but he claimed that Essig's visits on those occasions were with

respect to trouble that he had about "testing" on the work and with respect to obtaining cheaper help, matters which were not within the jurisdiction of the defendant. Essig, in rebuttal, denied this testimony. The defendant's stenographer testified that she saw Essig in the defendant's office two or three times between the 1st of January and the 1st of July, 1904, at intervals of four or five weeks.

The payment of the last note was not proved by the People, but was brought out by the defense on Essig's cross-examination. In connection with this fact, the defense showed that there was a general strike in August; that the men on "The Chatsworth" job went out with others, quitting on August sixteenth; that shortly prior to August sixteenth, the defendant endeavored to telephone Essig, but was unable to get into communication with him. Essig testified that on August seventeenth he had conversations with the owners, with an attorney named Cohn and a representative from the district attorney's office, relative to his transactions with the defendant, and was provided with \$250 in bills, some of them being marked; that from the district attorney's office he telephoned to the defendant and asked, "Why he pulled out my men;" that defendant denied that he pulled them out, and on being asked if he knew that they were out, said that he did and that he was trying to get the witness on the wire a couple of days and said, "You know what the trouble is," and the witness said, "I suppose the reason you pulled them out was because I was not down with the other money," to which the defendant answered, "Yes;" that witness then asked the defendant if he could see him; that defendant said he was awfully busy, but that if "you can come down in ten minutes I will give you five minutes." Essig then went down to see the defendant and the latter suggested that they go to the office of the People's Security Company (where it appears that the attorney for his union had an office) and went into a private office and had a conversation, the substance of which is that the defendant had learned that the district attorney was investigating his conduct in this matter and that for that reason he had destroyed the last note, but he asked for the amount of it which the witness paid over and the defendant counted, and while he was counting it the witness coughed, as a signal evidently to the detectives who were supposed to be in hearing.

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The testimony of Essig indicates that the defendant, therefore, became suspicious, for he said that he was informed that Kahn, a member of the owner corporation, had been before the district attorney, and he asked if this money which Essig gave him was Kahn's money, and thereafter left the room, asking the defendant to wait a minute, and remained absent about a minute. After the defendant returned they went down stairs, and the defendant said, "You know, Essig, that under the new law, the Prince law, you are just as guilty as I am." When they reached the ground floor the defendant was arrested by the detectives, but there is no evidence that any of the marked money was found on him. With respect to this interview the defendant testified in substance that it only consisted in the discussion of the reasons for the strike in August, and he denied that there was any payment of money or that they went into any private office. The testimony of other witnesses was introduced by the defense, evidently with a view to showing that Essig's story that he and the defendant went into one of the private offices was not true. The testimony of these witnesses, however, was contradicted by their own admissions or by other evidence, and it does not appear to be convincing.

The conversations had between the defendant and Johnson prior to the first strike were received under the exception and objection of the defendant, that they were incompetent and immaterial. The purpose of the evidence at the time it was offered was not stated, nor was the effect of it limited by the court in its reception.

At the close of the People's case, and at the close of the evidence, counsel for defendant moved to dismiss the indictment upon the ground that the evidence was insufficient to show the commission of the crime. The motions were denied and exceptions were duly taken. These exceptions are urged as grounds for reversal. The learned counsel for the defendant contends that the language shown to have been used by the defendant did not *per se* constitute a threat to do an unlawful injury to the property of Essig, or instill fear in the mind of Essig that it would be carried into execution. We are of opinion that the evidence was sufficient to show all the material elements of the crime. The facts bring the case fairly within the doctrine of *People v. Barondess* (61 Hun, 571) wherein the Court of Appeals affirmed the conviction upon the dissenting

opinion of Mr. Justice DANIELS at General Term (133 N. Y. 649) and within the case of *People v. Hughes* (137 id. 29) which followed it. In the *Barondess* case the defendant was president of an association of cloak operatives. The complainant was an employer of cloak operatives who had quit work owing to a controversy over the rate of wages. As a result of negotiations the workmen agreed to return but failed to do so. The complainants inquired of the defendant the reason for this and was informed that it was because they had not settled with him and he said to them, "You have got to pay me five hundred dollars to have your people back again to work." There, as here, the defendant finally compromised by taking less than he had first demanded. In that case the defendant represented that he controlled the employees, and the complainant testified that he believed that the defendant had power to keep the men from returning to work. It was there held that an injury to one's business is an injury to property within the provisions of the Penal Code defining the crime of extortion, and that a loss resulting from the suspension or interruption of business would constitute an injury to property. It is true that in the case at bar the defendant did not expressly represent that he controlled the striking employees and the complainant did not expressly testify that he believed that the defendant would keep the men from returning to work unless his demands were acceded to. The evidence, however, fairly warranted the jury in finding those facts. All known difficulties had been adjusted and there appears to have been no reason why the men did not return to work, except the influence and control exercised over them by the defendant as president of their union. The moment his unlawful demand was complied with the men resumed work and there was no further trouble until the complainant failed to pay the last note; and the defendant admitted, according to the testimony of Essig, that such failure was the reason for the strike at that time. The complainant testified in substance that he believed the defendant's threat to prevent the resumption of work until his extortionate demand was complied with. The defendant had shown his authority as president of the union and over members by peremptorily refusing to give the complainant a hearing before the union, when one of the delegates, at least, knew that the complainant was anxious to resume

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work and desired such hearing, with a view to presenting his grievance to the members. From the standpoint of the complainant the facts fairly justified a belief on his part that unless he paid the money and gave the notes, the men would not be permitted by the defendant to return to work and that the defendant had sufficient influence over them to carry out his threat. All grievances having been adjusted, the threat of the defendant, in effect to exercise his influence and control over the members of the union, to prevent their returning to work on this apartment building unless the money which he wrongfully exacted was paid, constituted a threat to do an unlawful injury to the property of the complainant calculated and sufficient to instill fear in the complainant and induce him to pay the money. There is no express evidence of the damages that would have been sustained by the complainant had he, instead of complying with the defendant's request, refused his unlawful demand and permitted the defendant to execute his threat. The *amount* of damages which he would have sustained is of no consequence. It is sufficient if it appears that he would have sustained damages. It would seem that the People might have readily shown more clearly that damages would have been sustained by Essig; but we think their failure to do so does not require a reversal. It is claimed that Essig's contract with the owners for the work, which was in writing, was not in fact what it purported to be, and that the owners were themselves to furnish the material, and the complainant was merely to be paid for superintending the work. Upon either theory it is manifest that he would have sustained damages. It is not to be presumed that he would have been paid for superintending work while the work was not being done. We think it presumptively appeared that the complainant, in his business, either as contractor or superintendent of building construction work, would have sustained damages had the defendant carried his unlawful threat into execution.

The court ruled that it was immaterial whether the money which Essig delivered to the defendant was his own or that of the Johnson-Kahn Company, and ruled out evidence offered by the defendant tending to show that it belonged to the company. It may be that Essig was acting as agent of the owners in receiving the money which he subsequently delivered to the defendant, because it was

originally received to pay the waiting time, but it was not material from what source it was received. The defendant wrongfully exacted money, and the complainant was liable to suffer loss if he did not obtain it from some source and deliver it to the defendant. It is urged that the rulings on this subject constituted prejudicial error. According to the plain provisions of section 552 of the Penal Code, the rulings were correct. The material issue in that regard was not whose money was it, but did the defendant receive it from the complainant.

The appellant contends that it was error to receive evidence of the defendant's threat to call a strike on the building when the former contractor, Rendall, was doing the work. We are of opinion that the evidence was clearly competent upon the question of the intent of the defendant by the threat made to Essig to do an unlawful injury to his property. The defendant pleaded not guilty. It was essential for the People to prove every element of the crime and the intent of the defendant to do an unlawful injury to the complainant's property was one of the essential elements of the crime. His former acts in relation to this contract work characterized the threat, and would tend to remove any doubt that the jurors might entertain as to his purpose of wrongfully inducing the men to remain out upon the strike without just cause. It is evident that he had determined to use his office as president of this union and his influence with the members to wrongfully exact a large amount of money, evidently based on a rough estimate made by himself of a percentage of the profits on the work, as a condition of allowing the members of his union to be employed by *any* contractor, or even by the owner in the completion of the work. It mattered not to him whether Rendall or Essig or some one else was the contractor. He had unlawful designs on the work and proceeded early in the history of the plumbing work to put his preconceived plan into execution. Since he threatened Johnson to call a strike on Rendall unless his unlawful demand was satisfied, it was a reasonable inference, in view of his threat to Essig, that he wrongfully intended to refuse to permit the men to return to work until the like demand made upon Essig was satisfied. It is urged on the appeal that the defendant's threat to Essig was innocent, and it was doubtless so argued before the jury. The fact that

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the defendant had recently claimed that he had sufficient influence with his union in effect to call a strike at will, because, although there may have been good ground under the rules of the union for a strike, *he assumed to be able to avert it provided he received the money which he wrongfully exacted*, tended strongly to show, in connection with other evidence, that in making the threat to Essig he intended to wrongfully exert his influence with the journeymen plumbers to induce them to refuse to return to work until he gave his consent, or to wrongfully exercise his authority as president in withholding such consent. Doubtless the members of the union misjudged the defendant, for they appear to have placed explicit confidence in him and to have submitted blindly to his rule. Upon receiving the money and notes the defendant promised, in effect, that the men should return to work; and it is evident that the order for their return emanated from him, for there is no other explanation consistent with the testimony of Essig, which the jury doubtless believed, of how they came to return to work. The evidence of the prior attempt, therefore, shed light on the motive and intent of the defendant in making the threat to Essig, and indicated a preconcerted plan on his part to prevent the performance of this contract work unless he should, without right or authority, receive a large percentage of the profits to be arbitrarily and wrongfully exacted, and being closely connected in time and similarity of circumstances, it was competent both upon the question of motive and intent and as showing the successive steps in a preconceived plan which culminated in the crime for which the defendant has been convicted. (*People v. Sharp*, 107 N. Y. 467; *People v. Shea*, 147 id. 99; *People v. Zucker*, 20 App. Div. 363; affd. on opinion of PATTERSON, J., 154 N. Y. 770; *People v. Molineux*, 168 id. 264, 305.) On the trial of an indictment for uttering forged paper, where the real issue was as to whether the defendant knew that it was forged, it has been held competent to show the utterance of other forged paper by him under similar circumstances and about the same period of time, upon the theory that such proof established a common plan and identity of method so connected as tends strongly to overcome any claim of innocence in uttering the forged paper for which the indictment was found. (*People v. Dolan*, 186 N. Y. 4.) In *People v. Putnam* (90 App. Div. 125; affd. on

opinion below, 179 N. Y. 518), which was one of the so-called "Sick Engineer Cases," this court said: "It is well settled that in cases of this kind where the fraudulent intent is an element of the crime, similar frauds of the same character and closely connected in point of time, are competent evidence to show the intent with which the crime was committed; and the mere fact that they tend to prove an independent crime does not render such evidence incompetent. It is competent to show the criminal intent of the parties directly connected with the transaction which is necessary to constitute the crime." In *People v. Van Tassel* (26 App. Div. 445; affd., 156 N. Y. 561), where there was a joint indictment for subornation of perjury, it was held, on a separate trial of one of the defendants, that evidence that they had endeavored to induce other witnesses to testify falsely upon the same trial was competent as tending to show motive and intent, and as relating to the same transaction and as done for the same purpose. In *People v. Doty* (175 N. Y. 164), on the trial of an indictment for feloniously receiving stolen property, it was held that evidence that the defendant had previously received property stolen by the same thieves, *but from other owners*, was admissible on the question of guilty knowledge of the defendant.

At the close of the main charge the court was requested to instruct the jury that "The jury cannot consider the statement of the witness, George Johnson, that the defendant asked him for \$3,000, as corroborative of the testimony of Essig that the defendant asked Essig for a sum of money." The court declined to charge "in the language requested." Counsel for the defendant excepted and assigns this exception as ground for reversal. Neither in the offer nor in the reception of the testimony of Johnson was its application limited, nor was there a request or even suggestion on the part of the defendant that it be limited. No specific reference was made to it in the charge, and the jury were not instructed with respect to its application. It is contended that the request which was refused was, in effect, a request to limit the application of that testimony. The only theory upon which this request to charge could be proper, would be that the evidence when received should have been limited to the question of motive and intent. If counsel for the defendant was of the opinion that it should have been so

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limited, he should, either at the time the evidence was received, or before or after the court instructed the jury, have pointedly drawn the attention of the court to that proposition. This, however, he failed to do. It was not proper to seek to have testimony thus received generally without any suggestion that its effect should be limited, by picking out the testimony of a particular witness and requesting the court to instruct the jury that it could not be considered as corroborative thereof. The court subsequently charged, at the request of counsel for the defendant, "That there is no direct testimony by any witness besides Essig to corroborate the statement of Essig that he was asked for any sum of money by Weinseimer December 31st, 1903." The jurors doubtless understood from this instruction that the testimony of Essig was not corroborated by the testimony of any other witness. It is reasonable to infer that such was the object of the request, since as no other witness testified to having overheard the conversations between Essig and the defendant the request could have served no other purpose. We are of opinion, however, that the instructions given on this subject were more favorable to the defendant than the law required, and one opinion has already been briefly expressed. Ordinarily, such evidence is competent only on the question of motive and intent, but here the evidence was competent generally as tending to show a previously conceived plan and determination on the part of the defendant to commit the crime of which he has been found guilty. Perhaps, owing to the fact that his former threat was to Johnson and before Essig became the contractor, the evidence may not have been strictly admissible as tending to show a previous attempt to commit the same crime, which would render it competent generally (*People v. O'Sullivan*, 104 N. Y. 481; *People v. Wagner*, 180 id. 58), because the crime as finally committed consisted in extorting the money from the succeeding contractor, but it is improbable that the personnel of the contractor figured in the defendant's mind. And it is to all intents and purposes except as to the individual who happened to have charge of the work as contractor at a particular time and whose individuality did not enter into the consideration, an attempt to commit the same crime. Since it has been settled that a prior attempt to burn the same building or rape the same female is competent generally as tending to show a preconceived plan and purpose to com-

mit the crime which, of course, would be corroborative of evidence that it was subsequently committed, it would seem to follow logically that a prior attempt or threat to burn the same barn or to steal the same property, as for instance a particular horse, would be competent even though ownership had changed in the interim. So here, I think, where it is quite clear that the purpose and plan were directed *not toward the individual but toward the contract work*, evidence of a prior attempt by the defendant to extort money either from the owner or from a former contractor so closely connected in time and similarity of circumstances as to indicate that the former wrongful demands and threat constituted a step in the preconceived plan and purpose which culminated in this crime, even though at the outset it could not have been known that Essig would be the contractor to be ultimately held up if the plan should not be successfully consummated sooner. His mind was upon this work and his plan and purpose was to unlawfully obtain some money from whoever did it as a condition of permitting it to be done by the members of his union. His previous threat was with respect to the same work, not remote in time from the threat to Essig, and the evidence indicates and warranted a finding that there was no change in plan and purpose from the outset, and that there was a continuity of conduct on his part indicating a deliberate design and determination to unlawfully obtain money as a condition of permitting this work to be done, which he finally consummated by exacting it from Essig. Within the authorities already cited, and particularly within the case of *People v. Zucker (supra)* where proof of the commission of another similar crime by the defendant was admitted and submitted to the jury as evidence corroborating the complaining witness, who was an accomplice, this evidence might have been properly considered by the jury as corroborating the testimony of Essig.

Notwithstanding the denial of guilt on the part of the defendant we are convinced by an examination of the testimony that the facts and circumstances proved clearly establish his guilt beyond a reasonable doubt. We have examined the other exceptions and find no error which demands a reversal of the conviction or requires extended consideration.

By section 542 of the Code of Criminal Procedure the Legisla-

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ture has commanded that "After hearing the appeal, the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." That command should not be lost sight of in any criminal case, and particularly in the case of a crime like this, which is a special menace to the public welfare. All controversies between capital and labor resulting in a strike injuriously affect more or less the entire community. They are sufficiently disastrous and deplorable when they result from an honest difference of opinion between the employer and the employed; but when, as here, the strike is protracted long after all grievances have been adjusted, by an officer of a labor union who betrays his trust to the fellow-members of his union, and in effect deprives them of their rights to work until he has unlawfully extorted money from their employer for his own ends, the crime is intolerable from any point of view and should be speedily and severely punished.

It follows that the judgment should be affirmed.

PATTERSON, P. J., McLAUGHLIN, HOUGHTON and SCOTT, JJ., concurred.

Judgment affirmed. Order filed.

In the Matter of the Application for an Order to Strike from the Enrollment Book of the Twentieth Election District of the Twenty-fifth Assembly District in the County of New York the Name of HENRY TITUS.

BERNARD GILES, Appellant; JOHN R. VOORHIS and Others, Commissioners of the Board of Elections of the City of New York, Respondents.

First Department, February 15, 1907.

Elections — application to strike name from primary enrollment — when affidavit insufficient — when public question involved.

The question of the sufficiency of an affidavit on an application under subdivision 11 of section 3 of the Primary Election Law to strike a name from the primary enrollment is of such public importance that the court will hear the case, although the primary election has been held.

Although it seems that the Legislature may prescribe such rules and regulations applying to all primary elections as it deems necessary and proper, and may provide for the removal of the name of an elector from the enrollment when he has removed from the district, yet when the Legislature has not made adequate provision to protect such elector from having his name stricken from the roll without his knowledge the said statute should be so construed as to afford him the necessary protection.

Said statute authorizes the removal of the name of an enrolled elector only upon proof constituting satisfactory evidence not only that the elector has removed from the address from which he registered, but from the election district as well. Hence, when such elector served by mail at his last known address has failed to appear in the proceeding to remove his name from the roll and the affidavit showing his removal from that residence given is not made by a lessee or occupant or janitor or proprietor of the premises, but by an occupant of a house in the vicinity, and the affiant has no personal knowledge that the elector has actually removed from the election district as well, but merely states that fact as a conclusion, the affidavit is insufficient, although uncontradicted, to make it a mandatory duty of the court to strike the name from the enrollment.

(Per SCOTT, J.): Such affidavit merely shows that the elector removed from the dwelling and raises no presumption that he removed from the district, and a mere statement that he no longer resided in the district is valueless as proof. CLARKE and INGRAHAM, JJ., dissented, with opinion.

APPEAL by the applicant, Bernard Giles, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1906, denying the appellant's application to strike the name of Henry Titus from the enrollment book of the twentieth election district of the twenty-fifth Assembly district in the county of New York.

James H. Hickey, for the appellant.

Theodore Connolly, for the respondents.

LAUGHLIN, J.:

The motion was made on an order to show cause granted by a justice of the Supreme Court on the 4th day of September, 1906, upon the application of Bernard Giles, on his affidavit and on the affidavit of Harry S. Middleton. The affidavit of the applicant showed unqualifiedly, among other things, that he was a citizen and duly qualified elector of the twenty-fifth Assembly district in the county of New York; that the name of Henry Titus appeared on the enrollment

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book of the twentieth election district of the twenty-fifth Assembly district as one of the electors enrolled as a Republican and entitled to vote at the next primary election to be held by said party; that the respondents are the commissioners of the board of elections of the city of New York and have the custody of the primary records of enrollment of said city, and that no previous application had been made for the order, and *upon information and belief* it showed, among other things, that Titus was not a qualified elector of said district for which the enrollment was made, in that he was enrolled as residing at No. 111 West Twenty-seventh street, and that he had removed from and no longer resided at said address nor in the election district in which he enrolled. The affidavit of Middleton showed that he resided at No. 448 Sixth avenue in said twentieth election district, and that said Titus "has removed from No. 111 W. 27th Street, and does not now reside there nor in said election district. His present address is unknown." The order to show cause provided that said commissioners of the board of elections show cause at a Special Term of the Supreme Court, to be held at a place therein specified in the city of New York on the 7th day of September, 1906, at ten-thirty o'clock A. M., or as soon thereafter as counsel could be heard, why an order should not be made directing that the name of Titus be stricken from the enrollment book pursuant to the provisions of section 3 of chapter 473 of the Laws of 1899, as amended. The affidavit of service of the order to show cause showed that it was served upon the enrolled elector by depositing a true copy thereof and of the papers upon which it was granted in the post office, inclosed in a securely sealed postpaid envelope, addressed to him at the address appearing on the enrollment book, on the 5th day of September, 1906, at nine-fifty o'clock, A. M., and on the commissioners of the board of elections by serving a true copy of the order and of the papers on which it was granted on the president of the board, at nine-thirty o'clock, A. M., on the same day. The order denying the application shows that the corporation counsel appeared and was heard in behalf of the commissioners of the board of elections, but does not show that the elector appeared.

The primary election for which the enrollment was made has been held, but it is contended on the part of the appellant that a public

question is involved, which the court should decide, notwithstanding the fact that the reversal of the order, if erroneous, can now be of no avail to the elector. We are of opinion that the question presented is one of such public importance that the court should hear the case and decide it upon the merits.

The appellant contends that the affidavit of Middleton, which was not upon information and belief, but asserted facts without qualification, should have been accepted, and being uncontroverted, that the application should have been granted. The respondents, however, claim that the Special Term was vested with a discretion and that the justice presiding was not obliged to accept an affidavit made by a person who was not a lessee or janitor or proprietor of the house from which the elector enrolled, but who appears to have resided elsewhere in the district, and that in the absence of evidence showing that the affiant was in a position to know the facts set forth, was justified in denying the application. The appellant argues that it should be presumed that the affiant had personal knowledge of the facts unqualifiedly set forth in his affidavit, and that if the elector had not moved out of the district, it was to be presumed that he would have appeared in opposition to the motion.

Subdivision 11 of section 3 of the Primary Election Law (Laws of 1898, chap. 179, as amd. by Laws of 1904, chap. 350), which was the only authority conferred upon the court for striking names from the primary enrollment book in the city of Greater New York, provided, among things, so far as material to the question presented, as follows: "If any statement in the declaration of any person, on the evidence of which his name was enrolled in the original enrollment book for any election district by the custodian of primary records, or if any entry opposite the name of any person in such enrollment book, is false, or if any person enrolled in such enrollment book has died, or has removed from or no longer resides in such election district, any elector of the assembly district in which such election district is located (provided such elector is himself duly enrolled with the same political party with which the person, as to whom the application is made, was enrolled) may present proof thereof by affidavit to the Supreme Court, or to any justice thereof, in the judicial district in which such election district

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is located, or to a county judge of the county in which such election district is located. And thereupon such court, justice or judge shall make an order requiring the person against or as to whom the proceeding is instituted unless he is shown to have died, as herein-after provided, to show cause before such court, justice or judge, at a time and place specified in such order, why his name should not be stricken from such enrollment book. Such order shall be returnable on a day at least ten days before a primary election, and a copy thereof shall be served on the person against whom the proceeding is instituted and on the custodian of primary records at least forty-eight hours before the return thereof, either personally or by depositing the same in the postoffice of the city in which such election district is located, in a postpaid wrapper or envelope addressed to the custodian of primary records at his office, and to such person by his name at his present address, if known, and otherwise at the address which appears in the enrollment book for such election district. * * * The custodian of primary records shall produce before the court, justice or judge the original enrollment declaration subscribed by the person against or as to whom the proceeding is instituted. The court, justice or judge shall hear the persons interested, and if it appears by sufficient evidence that any statement in the declaration of the person against whom the proceeding is instituted, on the evidence of which he was enrolled by the custodian of primary records, or any statement opposite his name in the original enrollment book is false, or that such person is dead or has removed from or no longer resides in the election district for which he is enrolled, shall order the name of such person stricken from the enrollment book, except as hereinafter provided. If at such hearing the person against whom the proceeding is instituted shall produce evidence that the custodian of primary records has incorrectly copied into the enrollment book the data contained in the declaration of such person, and that if correctly copied such person would be entitled to be enrolled in such election district, such order instead of requiring his name to be stricken from the enrollment book, shall require the correction of the enrollment book in accordance with such evidence. In either case the order shall require the custodian of primary records to strike such name from the enrollment

book, or to otherwise correct such enrollment book in accordance with such order."

The question for decision is whether the affidavits constituted a presentation of proof of the fact that the enrolled elector had removed from the election district and whether they constituted "sufficient evidence" of that fact to render it the mandatory duty of the court to strike the name of Titus from the enrollment book.

It is undoubtedly competent for the Legislature to prescribe such general rules and regulations, applying to all electors alike, as in its wisdom shall seem necessary and proper with respect to *primary elections*; and it may well be that it has authority to provide that if an elector removes from the residence from which he enrolled, without leaving his new address or informing the postal authorities thereof, so that he may receive notice under the existing law of an application to strike his name from the enrollment book, that it is his misfortune if he does not receive the notice and if his name is stricken from the enrollment book without his having an opportunity to demand his right to have it retained thereon. However, until the Legislature makes some provision by which an enrolled elector may protect himself against having his name stricken from the roll without his knowledge, the statute should be so construed as to enable the courts in passing upon such application to afford him the necessary protection. It would seem that a more practical rule could be readily prescribed, as for instance, that upon a change of residence the enrolled elector should notify the board of elections by letter or otherwise and that they should be required to make a record thereof and that the officers with whom the enrollment is made originally should be required to inform the elector at the time he enrolls of his duty to give this notice in the event of his changing his residence within the same district in order to retain his right to vote at the primaries. If such a rule were prescribed, then on proof of the removal of an elector from the residence from which he enrolled and proof that the records for changes of address kept by the custodians of the enrollment books did not show a removal to a place within the same district, or if they did that the elector did not reside there, the name might be stricken from the enrollment book with entire safety. This would not only be practical but it would be readily understood and no injustice could result because,

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except as to matters entirely within the control of the enrolled elector, the inquiry would be confined to the question as to whether he had removed from the address from which he had enrolled or to which he had removed and given the statutory notice. There may also be other practical rules that might be enacted which could readily be brought to the attention of all electors so that the rights of no one would be prejudiced and so that the perpetration of frauds, which it was the design of the Legislature to prevent, should be minimized, if not rendered impossible. However, these are questions for the Legislature and not for the courts. It remains with the court to interpret the law as enacted. The Legislature in the case of a change of residence by an enrolled elector has authorized and required action by the courts only in case of *proof* consisting of *satisfactory evidence* that the elector has not only *removed from the address from which he registered, but from the election district as well*. This question must be decided the same as are other questions presented for decision by the courts. A provisional remedy would not be granted upon such proof of the essential facts as was made in this case. The rule is that where it is apparent that the affiant is in position to have personal knowledge of the facts, his positive affidavit will be accepted, but that where it is not apparent that he is in position to have personal knowledge of the facts, his positive affidavit will be treated as a legal conclusion or a conclusion of fact not warranted by the facts presented, and will be deemed insufficient unless the facts showing his knowledge are set forth to sustain the conclusion. If the affidavit were made by the lessee and occupant of a house or by the janitor of a building or proprietor of a rooming or boarding house, it is manifest that he would be in a position to know whether the enrolled elector had removed, and it might be presumed that he would be in a position to know that the enrolled elector had removed from the district, even though he might not know the new address without the district; but where the affidavit is merely made by one of many occupants of a tenement, or as here, by an occupant of a house or tenement in the vicinity, it is neither manifest nor apparent that the affiant would have positive knowledge of the fact either of the removal of the elector from the address from which he enrolled, or from the election district, and we cannot and should not hold, in the present state of the

statutory law on the subject, that it is the mandatory duty of the Special Term on such affidavits and proof to strike the name of the enrolled elector from the enrollment book.

It follows that the order should be affirmed.

PATTERSON, P. J., concurred; CLARKE and INGRAHAM, JJ., dissented.

SCOTT, J. (concurring):

I agree that the order should be affirmed. The evidence that the elector had removed out of the election district was entirely insufficient and inconclusive. The most that was shown was that he had moved out of the house in which he had formerly resided, but this fact, in the more crowded section of the city, raises no presumption that the elector has moved out of the district. The statement of the affiant that the elector no longer resided in the district was valueless and was properly disregarded, because he failed to show that he had any knowledge on the subject.

CLARKE, J. (dissenting):

For the reasons stated in the opinion handed down herewith in *Matter of O'Brien* (117 App. Div. 628), the order appealed from herein should be reversed and the application granted.

INGRAHAM, J., concurred.

Order affirmed. Order filed.

In the Matter of the Application for an Order to Strike from the Enrollment Book of the Sixteenth Election District of the First Assembly District in the County of New York the Name of JAMES O'BRIEN.

DOMINICK DALESSANDRO, Appellant; JOHN R. VOORHIS and Others, Commissioners of the Board of Elections of the City of New York, Respondents.*

First Department, February 15, 1907.

APPEAL by the applicant, Dominick Dalessandro, from an order of the Supreme Court, made at the New York Special Term and

* See *Matter of Titus* (ante, p. 621).—[REP.]

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entered in the office of the clerk of the county of New York on the 23d day of November, 1906, denying the appellant's application to strike the name of James O'Brien from the enrollment book of the sixteenth election district of the first Assembly district in the county of New York.

James H. Hickey, for the appellant.

Theodore Connolly, for the respondents.

LAUGHLIN, J. :

In this case the affidavit which asserts the facts positively shows that the elector whose name it is sought to strike from the enrollment book, enrolled from No. 9 Mulberry street, and that the affiant resides at that number, but it does not show whether it is a private house or boarding house or a tenement, or whether the affiant is the janitor, lessee or proprietor, or that he is in a position to know the facts. We are of opinion that the rule laid down in the opinion in *Matter of Titus* (117 App. Div. 621), argued and decided herewith, should be applied here, and that the order should be affirmed upon the authority of the decision in that matter.

PATTERSON, P. J., concurred; CLARKE and INGRAHAM, J., dissented.

SCOTT, J. (concurring):

For the reasons stated in *Matter of Titus* I concur in result.

CLARKE, J. (dissenting):

Although for many years the conduct of the general elections had been minutely prescribed by law, prior to 1898 the internal affairs of political parties, the conduct of primary elections, the qualifications of voters thereat, the election and appointment of governing committees, district, city, congressional, county and State, and the composition and conduct of political conventions were governed by party rules and customs and had not been put under control of statutory enactment. It is a matter of local political history that in consequence of this untrammelled party government, widespread discontent had caused agitation looking towards legislative intervention. The complaints were based upon the fact that as an official ballot had been provided by the State, which alone could be

voted at the election, and upon which alone could be placed the names of candidates regularly nominated by the party conventions, except through the cumbersome and expensive machinery of independent nominations requiring a large number of nominators whose nominee was deprived of whatever benefit was to be gained from regular party candidacy, that the control of conventions was of the utmost importance. The party authorities had complete control of the party rolls. They could determine who should be admitted to the primaries and who kept out. There was thus concentrated in a few hands the important machinery of nomination for public office without fair submission to the will of the majority of the party voters. As a result of such agitation, the Legislature, by chapter 179 of the Laws of 1898, passed the first general law governing primary elections. It is entitled: "An act in relation to enrollment for political parties, primary elections, conventions and political committees."

The general scheme of the act, so far as enrollment was concerned, was to give every one an opportunity to enroll as a member of a party at the time that he registered as a voter for the general elections, on an official roll kept in the city of New York by the board of elections, and to provide that the right of a duly qualified voter to enroll should depend solely upon his own will, subject to challenge at the time of the enrollment, the questions submitted upon the challenge being prescribed in this act as follows: "Are you in general sympathy with the principles of the (naming it) party?" "Do you declare that you have not enrolled with, or participated in the primary elections or conventions of, any other party since the first day of last year?" "Is it your intention to support generally at the next general election, State or National, the nominees of the (naming it) party for State or National offices?" This act provided for a special enrollment during the month of December, following the registration, by which a voter who had not enrolled could, by filing with the board of elections a statement embodying the necessary declaration as to his party sympathies and intentions, be placed upon the roll if registered as a voter. It also provided that if, after enrollment, he should move into another election district between the first day of February and the thirtieth day before the annual primary day, except as therein provided,

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upon filing an acknowledged statement of his change of residence, he could be transferred upon said rolls to the new district. It further provided that the party rolls so made up should go into effect on the first day of January following the days of registration and, with any additions or changes made as therein provided, remain in force until the first day of the following January, and it provided for official primary elections presided over by the inspectors of election belonging to the particular party at which the duly enrolled party voters, and only those enrolled, could vote, and the machinery of such primary election was conformed to that provided for the general elections in the way of poll lists, watchers, canvassers, etc.

This act was amended by chapter 111 of the Laws of 1903. The provisions allowing a special enrollment, or of a voter coming of age after the last preceding general election, or allowing, when a voter had moved from one election district into another, a transfer to a new district, were repealed as to cities containing a population of 1,000,000 or over, and it was expressly provided that "In such cities no elector shall be permitted to enroll as a member of a party except at one of the four regular meetings for registration."

Experience had demonstrated, as is usually the case in regard to novel remedial legislation intended to apply to existing conditions, that evils unanticipated had grown up thereunder. That the opportunity given for special or supplemental enrollment and for change of enrollment consequent upon change of residence had not worked well. The individual's right to participate in his party government, therefore, was by this act of 1903 fixed as of the regular registration days for the regular general election, and the roll as so fixed lasted for the ensuing political year and no one could be added thereto during said year.

But the roll so made permanent in its turn gave opportunity for political manipulation and actual fraud. A roll made up in October of one year was to be used as the basis of the rights of the voters to participate in the primary election of September of the next year. The names once upon those rolls remained there whether the men whom the names represented were dead or alive or had removed from their election district or even from the State. It is a fact so well known that members of a court residing in this city may take judicial notice of it, that a large portion of our population is

extremely migratory in its habits. This condition was then presented: In districts of the city where a lively contest was proceeding for the control of the party machinery, which meant in many instances the ultimate choice of public officials, a fixed roll was in existence upon which were the names of many men not representing legal voters, men who had either died or removed since the registration day, eleven months before. Experience has demonstrated in our local history that the opportunity afforded by such a state of affairs will be seized upon by ambitious and unscrupulous men, and that the names upon the list will be utilized to get votes in the box, whether the men putting them in the box are entitled to put them in or not. Fraudulent impersonation and ballot-box stuffing have occurred. The public prints have reported such contests and the courts have had to do with some of the results thereof.

Wherenpon the Legislature attempted to remedy this evil. No one can examine carefully and thoughtfully the acts of the Legislature from year to year, touching the elections in this great city, without being impressed by the constant effort to insure an honest election and a fair count. The ingenuity of the evaders of the laws passed with the purpose of procuring such a result is illustrated by the successive acts attempting to meet the new devices of the election rogues as they come to light.

In order to meet this evil of a fixed official legalized primary roll made one year, to be voted upon the next, to be upon which, alone, permits a person to exercise a right of primary franchise, and which during such lapse of time becomes not a correct roll, but a roll containing numbers of names which cannot be lawfully voted upon, but which nevertheless are used to control the political affairs of the party, the Legislature passed chapter 350 of the Laws of 1904 (adding to Primary Election Law, § 3, subd. 11), applicable only to cities containing a population of 1,000,000 or over, and provided as follows: "If any statement in the declaration of any person, on the evidence of which his name was enrolled in the original enrollment book for any election district by the custodian of primary records, or if any entry opposite the name of any person in such enrollment book is false, or if any person enrolled in such enrollment book has died, or has removed from or no longer resides in such election district, any elector of the

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assembly district in which such election district is located (provided such elector is himself duly enrolled with the same political party with which the person, as to whom the application is made, was enrolled) may present proof thereof by affidavit to the Supreme Court, or to any justice thereof, in the judicial district in which such election district is located, or to a county judge of the county in which such election district is located. And thereupon such court, justice or judge shall make an order requiring the person against or as to whom the proceeding is instituted, unless he is shown to have died as hereinafter provided, to show cause before such court, justice or judge, at a time and place specified in such order, why his name should not be stricken from such enrollment book. Such order shall be returnable on a day at least ten days before a primary election, and a copy thereof shall be served on the person against whom the proceeding is instituted, and on the custodian of primary records at least forty-eight hours before the return thereof, either personally or by depositing the same in the postoffice of the city in which such election district is located, in a postpaid wrapper or envelope addressed to the custodian of primary records at his office, and to such person by his name at his present address, if known, and otherwise at the address which appears in the enrollment book for such election district. If the person as to whose name the application is made is claimed to be dead, the order to show cause hereinabove provided for shall be directed to the custodian of primary records, and service thereof need only be made upon such custodian of primary records, such service to be made in the manner heretofore in this subdivision specified; but an order requiring the custodian of primary records to show cause why the name of a person claimed to be dead should not be stricken from the enrollment book shall not be made unless the affidavit presented to the court, justice or judge by the elector instituting the proceeding shall state that such elector has personal knowledge of the death of the person with respect to whose name the application is made and unless such affidavit is substantiated either by a certificate of the health department, or by other competent evidence of such death. The custodian of primary records shall produce before the court, justice or judge, the original enrollment declaration subscribed by the person against or as to whom the proceeding is instituted.

The court, justice or judge shall hear the persons interested, and if it appears by sufficient evidence that any statement in the declaration of the person against whom the proceeding is instituted, on the evidence of which he was enrolled by the custodian of primary records, or any statement opposite his name in the original enrollment book, is false, or that such person is dead or has removed from or no longer resides in the election district for which he is enrolled, shall order the name of such person stricken from the enrollment book, except as hereinafter provided. If at such hearing the person against whom the proceeding is instituted shall produce evidence that the custodian of primary records has incorrectly copied into the enrollment book the data contained in the declaration of such person, and that if correctly copied such person would be entitled to be enrolled in such election district, such order instead of requiring his name to be stricken from the enrollment book, shall require the correction of the enrollment book in accordance with such evidence. In either case the order shall require the custodian of primary records to strike such name from the enrollment book, or to otherwise correct such enrollment book in accordance with such order. Upon the correction of such enrollment book in accordance with such order, the custodian of primary records shall certify such correction to the chairman of the general committee of each party to whom a duplicate set of enrollment books has been delivered in pursuance of subdivision seven of this section." This was a remedy provided to purge the roll.

Under the provisions of said act, the applicant herein submitted his verified application setting forth that he was a citizen of the United States, of full age, a resident of the first Assembly district in the county of New York and that he was a duly qualified elector and an enrolled Republican in said Assembly district; that the name of James O'Brien appeared on the enrollment book of the sixteenth election district of the first Assembly district as one of the electors enrolled with the Republican party of the district and as there entitled to vote at the next primary election, and "on information and belief the said elector is not qualified or entitled to vote in said election district at the next primary election, the election for which said enrollment was made, for the following reasons, to wit: Said elector is enrolled upon the said enrollment book as residing at No.

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election district and said elector has
lives at said address nor in said elec-
tion district as aforesaid." This application
was made by one Capone, who deposed: "I
reside at 16th Street in the Borough of Manhattan, city
of New York, in the 16th Election District of the
County of New York. The above-
named elector, James O'Brien, has removed from No. 9 Mulberry
Street and does not now reside there, nor in said election district.
His present address is unknown." Upon such papers, the court at
Special Term issued an order to show cause addressed to the com-
missioners of the board of elections as custodians of primary records
and James O'Brien, why an order should not be made directing the
said custodians to strike the name of said O'Brien from the enroll-
ment book. This order, together with the affidavits and proposed
final order were served on James O'Brien by inclosing a true
copy thereof in a postpaid envelope addressed to him at his address
appearing upon said enrollment book in the manner provided by the
said law, and also upon the commissioners of the board of elections.
Upon the return day the said O'Brien did not appear. The com-
missioners of the board of elections appeared by the corporation
counsel and opposed the application. The learned court at Special
Term denied the application and the applicant appeals. The com-
missioners of the board of elections represented by the corporation
counsel alone appears as respondent in this court.

The functions of that board are purely ministerial in the premises.
It was claimed in the court below, and is urged here, that the papers
upon which the application was asked failed to provide that "suffi-
cient evidence" required by the law to authorize the striking of the
name from the roll. In other words, that a positive affidavit by a
person residing in the same house given as the address of the person
proceeded against, that "the above-named elector, James O'Brien,
has removed from No. 9 Mulberry Street and does not now reside
there, nor in said election district," is destroyed by the further
phrase, "His present address is unknown," and that the tender
regard of the court for the rights of the voter will not permit it to
order his name stricken from the primary roll made up eleven months
before, notwithstanding a resident of the same house swears that he

no longer resides there and has moved from the election district; although said voter puts in no appearance, although the papers in a secure and postpaid envelope sent to the address given, elicited no response, because the affiant states what is presumed to be the truth, as he swears to it, that he does not know what his present address is.

It seems to me that any such rule destroys the law. The very purpose of the act is to meet the exigencies of the crowded and migratory population of the city of New York. It is to reach people who have the apparent right to vote and who have moved since they enrolled, and who have gone no one knows where. It seems to me that enough was submitted to make out a *prima facie* case and that where no one appears to complain of a proposed or accomplished invasion of his rights of primary franchise, the court ought not, upon the opposition of a mere ministerial body, to indulge in such an over-refined analysis of the papers as in effect to judicially repeal a proper law passed by the Legislature to meet and remedy a known evil.

This court, in *Matter of Morgan, In re Rolle* (114 App. Div. 45), upheld chapter 675 of the Laws of 1905 (amdg. Election Law [Laws of 1896, chap. 909], § 31), which provided for the striking of an elector's name from the registration list for a general election upon the affidavit by the State Superintendent of Elections or any of his deputies, when duly directed, that he had interrogated an inmate, house-dweller, keeper, care-taker, owner, proprietor or land lord thereof as to said elector's residence therein, and that the said affiant was informed by one or more of said persons (naming them) that they were acquainted with and knew the persons residing therein and that the elector did not reside in said premises thirty days before election, and made said affidavit presumptive evidence upon which an order could be made striking the name from the list.

In that case, an affidavit upon information of an inmate, etc., was held to be sufficient to authorize an order to deprive the registered elector of his right to vote at a general election. In this case we have the positive affidavit of an inmate of the house that the enrolled elector has moved and does not reside in the election district. In my opinion, that is enough, considering the conditions that exist, the history of the Primary Election Law and the evils aimed at, to warrant the court, in the absence of any countervailing

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suggestion of the right of the person proceeded against to remain on the roll, to remove him from it.

Although the election has long since passed, we have treated this case as other election cases have been treated, as a matter of such general interest and importance that it ought to be passed upon.

For the foregoing reasons the order appealed from should be reversed and the application granted.

INGRAHAM, J., concurred.

Order affirmed. Order filed.

In the Matter of the Application for an Order to Strike from the Enrollment Book of the Twenty-seventh Election District of the Twenty-fifth Assembly District in the County of New York the name of JOHN MCGUIRE.

LONDON T. DAVIES, Appellant; JOHN R. VOORHIS and Others, Commissioners of the Board of Elections of the City of New York, Respondents.*

First Department, February 15, 1907.

APPEAL by the applicant, Landon T. Davies, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1906, denying the appellant's application to strike the name of John McGuire from the enrollment book of the twenty-seventh election district of the twenty-fifth Assembly district in the county of New York.

James H. Hickey, for the appellant.

Theodore Connolly, for the respondents.

LAUGHLIN, J.:

The material facts presented by this record differ from those presented in the *Matter of Titus* (117 App. Div. 621), argued and decided herewith, only in that the affiant, who asserts the facts positively, resided next door on the same avenue to the number

* See *Matter of Titus* (ante, p. 621).—[REP.]

from which the elector enrolled, and consequently the opinion in that matter is decisive of this appeal.

It follows that the order should be affirmed upon the authority of the opinion in *Matter of Titus*.

PATTERSON, P. J., concurred; CLARKE and INGRAHAM, JJ., dissented.

SCOTT, J. (concurring):

For the reasons stated in *Matter of Titus*, I concur in result.

CLARKE, J. (dissenting):

For the reasons stated in the opinion handed down herewith in *Matter of O'Brien* (117 App. Div. 628), the order appealed from herein should be reversed and the application granted.

INGRAHAM, J., concurred.

Order affirmed. Order filed.

EDWIN D. HAWLEY, Respondent, v. CASSIUS M. WICKER, Appellant.

First Department, February 15, 1907.

Sale of stock induced by misrepresentation — facts raising question for jury.

The maker of a promissory note given in part payment of stock defended upon the ground that the purchase was induced by fraudulent representations by the plaintiff with respect to the value of the assets and stock of the corporation. On the trial it appeared that the parties had been friends for many years and that the plaintiff was director, president and member of the executive committee of the corporation, which was a trust company, and was familiar with its assets and financial condition; that the defendant who purchased the stock from the plaintiff was an engineer and had no knowledge or information respecting the financial condition of the corporation except as imparted by the plaintiff. It was shown that the defendant told the plaintiff that he intended to invest money in other stock and that the plaintiff urged the defendant to buy instead the stock of the trust company owned by him, at the time representing that the surplus of the company was intact, that its securities were good for their face value, that no loss from unfortunate investments would use up the surplus and that another financier was trying to buy the stock; that the plaintiff after selling the stock to the defendant resigned as an officer of the company; that the aforesaid representations proved to be false; that the defendant could have purchased the stock at a lower value in the open

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market, and that the corporation went into the hands of a receiver with the loss of its entire surplus and undivided profits and the impairment of its stock to half the face value.

On all the evidence,

Held, that the representations by the plaintiff could not, as a matter of law, be said to be mere expressions of opinion, but raised a question for the jury, and the direction of a verdict for the plaintiff was error.

APPEAL by the defendant, Cassius M. Wicker, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of June, 1906, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 5th day of July, 1906, denying the defendant's motion for a new trial made upon the minutes.

Anson M. Beard, for the appellant.

Arnold L. Davis, for the respondent.

LAUGHLIN, J. :

On the 12th day of July, 1904, the plaintiff sold and delivered to the defendant 113 shares of the capital stock of the Merchants' Trust Company, a domestic banking corporation, for \$25,000, being a little more than \$220 per share, the par value of each share being \$100. The defendant paid to the plaintiff the sum of \$22,600 on account of the purchase price of the stock and gave a promissory note for \$2,400, the balance. The action is brought to recover on the note, which was not paid. The defendant admitted making the note, but alleged that it was given in part payment for the stock, the purchase of which was induced by fraudulent representations made by the plaintiff with respect to the value of the assets of the corporation and of the stock, and interposed a counterclaim to, recover the cash payment upon the same theory. At the close of the evidence the court dismissed the counterclaim and directed a verdict in favor of the plaintiff on the note. Counsel for the defendant duly excepted and requested to go to the jury upon the evidence, which he claimed tended to establish the defense of fraud in the sale of the stock. The plaintiff and the defendant had been personal friends for nearly twenty-five years. At the time of the sale of the stock the plaintiff was a director, the president

and a member of the executive committee of the Merchants' Trust Company, and had been for more than a year. The evidence tends to show that he was entirely familiar with the nature of the assets of the company and with its financial condition. The company had invested in bonds of the Hudson Valley Railroad Company, or had loaned that company to a considerable extent. The defendant was an engineer and had been employed in connection with the Hudson Valley Railroad Company, and was familiar with its financial condition, but he had no knowledge or information with respect to the financial condition of the Merchants' Trust Company or the value of any of the other assets, excepting the information imparted to him by the plaintiff and knowledge that it was having some difficulty with the State Superintendent of Banks. According to the testimony of the defendant, he contemplated investing some money in the Steel Car Company, and consulted the plaintiff with respect thereto, whereupon the plaintiff suggested that the defendant buy his Merchants' Trust Company stock instead, and represented in substance, among other things, that the company had had trials and tribulations owing to the "Richmond properties," which it had held and which had subjected it to criticism and lowered the market value of its stock, but that it had disposed of these properties, "except a little," to Frank Gould, which would make the balance of that property held by the company valuable; that the stock and surplus of the company had not been infringed upon and it was all intact; that all the securities held by the company, "outside of possibly the Hudson Valley, which was still in some trouble," were "good and worth their face value; all worth their real value;" that they were worth the book value, and that no loss upon the Hudson Valley securities would use up the surplus; that Mr. George W. Young, either for himself personally or for the United States Mortgage and Trust Company, of which he was president, was very anxious to buy the plaintiff's stock, but that plaintiff preferred to sell it to defendant, and that the plaintiff, on being requested so to do, refused to permit an inspection or examination of the books of the company, upon the ground that it would be a breach of trust, and that he would be subject to criticism for thus allowing an examination of the books, which would show the *valuable* information he had as to the financial condition of the company, with a view to selling his own stock at a

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profit. The plaintiff gave the defendant a statement, issued in the usual course of its business by the company on the 30th day of June, 1904, showing the total value of the assets as carried on the books of the company on that day, and its liabilities. This statement showed that the capital stock was \$500,000; that the surplus was \$1,000,000, and that the assets equalled the liabilities, including the capital stock and surplus and \$201,166.99 undivided profits. The defendant further testified that he could have obtained the stock in the market for \$200 per share, but that he paid the plaintiff more because he was a friend, and being an officer of the company was in a position to know the facts which he had stated to the defendant, all of which defendant believed and relied upon. He was, doubtless, influenced also by the plaintiff's offer to have him elected a director of the company. After selling the stock to the defendant the plaintiff resigned as an officer and director of the company, and the defendant was elected to succeed him as director, and was also made vice-president of the company. Within three days thereafter the defendant obtained information which led him to believe that many of the representations made to him by the plaintiff, and upon which he had relied in purchasing the stock, were untrue, and tendered back the stock and demanded the consideration paid, which was refused. It appears that during many months prior to the sale of the stock the plaintiff, who was an operator on Wall street and thoroughly familiar with the stock market, and other officers of the company were endeavoring, under pressure from the State Superintendent of Banks, to sell many of the securities held by it other than the Hudson Valley railroad securities, and that no market could be found therefor; that long prior to the sale Mr. Young, with a view to purchasing for the United States Mortgage and Trust Company, had obtained leave to have the books of the Merchants' Trust Company examined by an expert, and had received the report; that Mr. Young had not sought the purchase of the plaintiff's stock, and that in the event that the United States Mortgage and Trust Company purchased a controlling interest, the plaintiff intended to retain his stock, and that he had not, after the report of the expert was made, heard from Mr. Young or inquired whether his plan to purchase such controlling interest

for his company had been abandoned; that in the month of May thereafter the Merchants' Trust Company went into the hands of a receiver, and its assets were sold by the receiver during the succeeding six months and resulted in a loss, not only of the entire surplus and undivided profits, but of the impairment of at least one-half the face value of the capital stock, and that at the time the company went into the hands of the receiver it held all of the securities which it held at the time of the sale of the stock to the defendant, and was in the same condition, if not a more favorable condition, owing to the fact that there was then a market for many of the securities for which none had previously been found. The sale of the assets by the receiver was presumably made at public auction under the direction of the court, and the amount realized thereon was, in the circumstances, some evidence of the value of the assets at the time the plaintiff sold the stock to the defendant.

It is contended by the learned counsel for the respondent that the representations made by the plaintiff with respect to the value of the assets of the company were mere expressions of opinion, and that they were true. We are of opinion, however, that the jury would have been justified in finding that they were intended as statements of facts of which the plaintiff had personal knowledge; that they were untrue and were fraudulently made with a view to inducing the defendant to purchase the stock and that he was induced thereby to purchase it. It can neither be maintained as matter of law that they were mere expressions of opinion, nor that they were not material representations. Moreover, the jury would have been justified in finding that the representation concerning Mr. Young, who was a prominent financier, was a material representation; that it was false and that it was one of the inducements which led the defendant to purchase the stock. It follows, therefore, that the court erred in dismissing the counterclaim and directing a verdict for the plaintiff.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

PATTERSON, P. J., INGRAHAM, CLARKE and SCOTT, JJ., concurred.

Judgment and order reversed, new trial ordered, cost to appellant to abide event. Order filed.

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BENJAMIN PRITZ and Others, Doing Business as Copartners under the Firm Name of STRAUSS, PRITZ & Co., Respondents, v. PATRICK JONES and Others, Appellants, Impleaded with JOHN BELFORD, Defendant.

First Department, February 15, 1907.

Debtor and creditor—judgment creditor's action to set aside sale of personality—right of insolvent incompetent to pay debts—pleading—failure to show transfer in fraud of creditors—when judgment creditor of incompetent may rescind sale induced by fraud—restitution in equity—failure to show sale in violation of chapter 569 of the Laws of 1904—practice—only one judgment on demurrer authorized.

The complaint in a judgment creditor's action in substance alleged that one B., the judgment debtor, had a lease of a saloon with a right of renewal from year to year so long as he purchased beer from one D., who was owner of the building and fixtures; that D. required B. to assume a fictitious mortgage on the premises; that B. was mentally disordered by drink and incompetent intelligently to transact business or enter into contracts; that D. notified B. he must sell out and vacate, whereupon, while intoxicated, he sold his business and good will for \$1,950 to the defendants J. and M., which sale was consummated in the office of D.; that the actual value of the business sold was \$3,000; that the money received by B. was mostly expended in paying his debts, and that the transaction left him totally insolvent. These transactions were prior to the plaintiff's judgment against B. for goods sold.

Held, that the complaint failed to state a cause of action against the defendant D., as it was not alleged that D. had possession of any of the property transferred by B.;

That even though one be incompetent he may pay his debts and his incompetency is not ground for setting aside the transaction;

That as the alleged fictitious mortgage was not a lien upon anything owned by B. or transferred by him, the judgment creditor was not entitled to a cancellation thereof;

That as against the defendants J. and M., who purchased the business, the complaint stated no cause of action to set aside the transfer as fraudulent against creditors, there being no allegation of intent to hinder, delay or defraud creditors on the part of B.;

That although allegations of fraudulent intent are not absolutely necessary where facts showing intent are set forth, the facts alleged must reasonably lead to a conclusion of fraudulent intent which fairly excludes any other hypothesis;

That an insolvent may sell his property in good faith without fraudulent intent, although the sale places the property beyond the reach of creditors;

That the presumptions growing out of the Bankruptcy Act do not obtain in an ordinary judgment creditor's action;

Held, further, that the allegations that B., by reason of drink, was not in fit condition to transact business, and was unable to understand his acts or the effect thereof, was not a sufficient allegation of insanity to enable a judgment creditor to recover the property sold as standing in the shoes of the seller;

Nevertheless, it is *held* that treating the complaint as alleging fraud perpetrated upon the seller by procuring his intoxication, the judgment creditor must be considered as standing in the shoes of the seller and entitled to equal right to rescind the sale if fraudulent;

That the facts alleged showed that the seller was entitled in equity to rescind the transaction on the ground of fraud, and that this equitable right was a chose in action which a judgment creditor may reach by a suit in equity;

That although he who seeks equity must do equity, and in rescinding a sale return the amount paid to the vendee, and although in equity an actual tender before suit is not necessary, but the plaintiff must offer restoration in the complaint, the offer of restitution in the pleading is not a prerequisite to the institution of the suit but a condition for granting relief, and the complaint may be sustained where the plaintiff prays for general relief agreeable to the cause.

That although the complaint alleged that the merchandise was sold in bulk, not in the ordinary course of trade, without filing an inventory thereof five days before the sale, and without making inquiry as to the names and addresses of creditors, and without notification to creditors, a cause of action was not stated under chapter 569 of the Laws of 1904;

Held, further, that when several defendants demur only one decision is authorized, which should determine their several rights.

INGRAHAM, J., dissented in part, with opinion.

APPEAL by the defendants, Patrick Jones and another, and by the defendant Peter Doelger, respectively, from two separate interlocutory judgments of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 31st day of July, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the said defendants' demurrers to the complaint.

Abraham Benedict, for the appellants.

Allan R. Campbell of counsel [*Hyman, Campbell & Eaton*, attorneys], for the respondents.

CLARKE, J.:

Appeals from two interlocutory judgments overruling the defendants' demurrers to the complaint.

The complaint alleged that plaintiffs recovered a judgment against

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defendant Belford for the sum of \$1,119.37 on November 10, 1905, which was immediately docketed and execution issued thereon to the sheriff, who returned the same unsatisfied on November twenty-third; that on October 18, 1905, and for a long period prior thereto defendant Belford had a saloon and café in the city of New York and was engaged in the liquor business.

That Belford had a lease of said saloon from May 1, 1905, to May 1, 1906, and the right to renew said lease from year to year so long as he purchased beer from defendant Doelger. That the building and fixtures were owned by Doelger, who rented them to Belford. That Doelger, though the owner of the premises, required Belford to assume a mortgage of \$10,000 thereon, which mortgage was wholly fictitious and without consideration; that throughout the year 1905, and prior to that time, Belford had been a hard drinker, and that in July or August, 1905, he received a severe blow upon the head which seriously injured his brain and deranged his mind, and "by reason of the aforesaid injury and the aforesaid drinking, at no time since the date of said injury has said Belford been in fit condition to transact any business or to intelligently pass upon any business proposition or to enter into contracts."

That on October 17, 1905, defendant Doelger notified Belford that he must sell out and vacate forthwith, and that Doelger refused to accept another tenant who had made Belford an offer of \$3,500 for the place. That on the next day a stranger called upon Belford, and having given the latter several drinks of whisky and rendered him totally unfit to discuss or consider any business propositions or to understand his acts, offered him \$50 cash if he would sell his place, equipment, business and good will for \$1,950, and that Belford accepted the proposition and signed a contract embodying its terms. That thereupon the stranger notified Belford that he was acting as agent in the matter for defendants Jones and Moran, and that the transaction would be closed at the office of the defendant Doelger, where said Belford would receive \$1,900, and sign a bill of sale. That continuously after signing this contract Belford steadily drank alcoholic beverages, and that at no time between the signing of the contract and October 21, 1905, was he able to comprehend the nature of his acts, or the effect thereof, which fact was apparent and well known to every person with

whom he came in contact. That on October 20, 1905, Belford called at the office of Doelger, and a representative of the latter then notified him that he owed said Doelger the sum of \$1,197, and thereupon gave to Belford Doelger's check for \$703, the difference between the amount of the alleged indebtedness and the price agreed upon in the contract. That Belford thereupon spent part of the proceeds of said check and paid certain loans with the balance; that on the night of October 20, 1905, in the presence of a representative of the defendant Doelger, defendants Jones and Moran took possession of said premises.

That throughout these negotiations Belford was indebted to an amount exceeding \$3,000, in addition to the claims of the defendant Doelger, and the claims for borrowed money, paid with the proceeds of the check. That it was well known to all of the defendants that Belford was so indebted, and that the transaction in question would leave him totally insolvent, and that Belford's creditors would be deprived thereby of all means of collecting their debts. That "the place, location, equipment, business and good will of said Belford were at the time of said transaction worth at least the sum of \$3,000, as was well known to defendants."

That the sale by Belford was a sale of Belford's stock of merchandise in bulk and otherwise than in the ordinary course of trade, and that said Belford, Jones and Moran did not at least five days before said sale make a full inventory of said property transferred, nor did they make inquiry of Belford as to the names and places of residence of each of his creditors, and obtain from him a written answer to said inquiries, nor did they notify each of Belford's creditors of the sale.

The complaint prayed that the transaction in question be declared fraudulent and void as against plaintiffs; that said transaction be set aside and a receiver appointed; that the mortgage of \$10,000 be canceled, or, in the alternative, that the transaction be declared fraudulent and void, and that defendants Doelger, Jones and Moran be compelled to pay to plaintiffs the value of the assets transferred and the profits of conducting the business from the time of the alleged sale, or, in case the relief so prayed for could not be granted, then that defendants Doelger, Jones and Moran pay to plaintiffs, as creditors of Belford, the sum of \$1,950.

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1. Appellant Doelger contends that the complaint states no cause of action against him.

This contention is well founded. The utmost that can be inferred from the complaint is that Doelger probably furnished to Jones and Moran, upon some terms not disclosed the money with which the latter paid Belford for the transfer of the business. It is not alleged that Doelger has or ever had in his possession any of the property of Belford so transferred. Assuming for the moment that the complaint alleges Belford's incompetency, the mere fact that while incompetent he has paid to Doelger a debt owing to him is not a ground for setting aside the transaction. An incompetent may pay his just debts as well as one who is competent. I fail to see how plaintiff is entitled to cancellation of the \$10,000 mortgage which it is alleged Doelger caused Belford to assume. This mortgage does not appear to be a lien upon anything which was ever owned by Belford or transferred by him. The complaint states that the building and fixtures were owned by Doelger and that the mortgage was "upon said premises." There is nothing to show that Doelger is attempting to enforce any claim for \$10,000 or any other sum as secured by said mortgage.

2. Appellants contend that the complaint states no cause of action against Jones and Moran for a transfer fraudulent as against creditors. Reduced to its ultimate analysis in this regard, the complaint alleges that Jones and Moran, knowing that Belford was insolvent, bought from him a business worth \$3,000 for \$1,950, the result being that beyond the purchase price Belford would have nothing with which to pay creditors to whom he owed \$5,000.

In order to set aside a transfer upon the ground that it was intended thereby to hinder and defraud creditors, it must appear that such intention existed upon the part, both of the transferor and transferee. There is in this complaint no allegation of an intent to hinder, delay or defraud creditors on the part of Belford, the transferor, nor that Jones and Moran, the transferees, purchased with intent to assist Belford in perpetrating a fraud upon his creditors. Indeed it is not alleged that the plaintiffs were creditors at the time of the transaction complained of. While the allegation of fraudulent intent is not an absolute necessity where facts clearly showing such intent are set forth, plaintiff cannot ask a court to

impute a fraudulent intent when he makes no assertion thereof, and the facts stated do not compel the inference. Fraud must be shown. It is usually deduced from facts which naturally and logically indicate its existence. The circumstances relied upon must be such as fairly and reasonably lead to the conclusion of a fraudulent intent and fairly and reasonably exclude any other hypothesis. (*Shultz v. Hoagland*, 85 N. Y. 464; *Lopez v. Campbell*, 163 id. 340.)

Belford, although insolvent, had a right to sell his property provided he did so in good faith and without fraudulent intent, although the effect of sale was to place the property beyond the reach of his creditors. There is nothing to show the existence of a fraudulent intent as to his creditors. For a business only alleged to be worth \$3,000, the value thereof, as must be apparent, mostly consisting of the good will, defendants paid \$1,950 so far as appears before Belford became indebted to the plaintiffs. Belford did not retain possession of the property after the transfer. No credit was extended upon an apparent possession which did not in reality exist. There was no colorable assignment under which Belford remained the real owner. It is affirmatively alleged that Jones and Moran took possession of the premises at once. It is also alleged that Belford applied almost all of the purchase price received by him to the payment of his debts.

We think as between subsequent creditors and Jones and Moran, nothing is shown to warrant setting aside the transfer to them as fraudulent. There is nothing alleged which shows any intent on their part to hinder, defraud or delay these plaintiffs. This action is not in the bankruptcy court, and no presumptions growing out of the provisions of the bankruptcy statute are to be indulged in.

3. Can the judgment creditors maintain the action to set aside the transfer, not upon the ground that it was fraudulent as against creditors, but as standing in the shoes of Belford to recover property wrongfully obtained from him? The first suggestion is that he was incompetent to make a contract. It seems to be established that the contracts of an insane person are voidable by the insane person himself, if he should thereafter recover his reason, or by a committee duly appointed of his estate, or, after his death, by his privies in blood or in estate. These judgment creditors claim such an interest in his estate as to entitle them to bring suit.

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Without passing upon that question, about which there may be some doubt, it is sufficient to say that the allegations of the complaint are not sufficient to establish the insanity of Belford. It is nowhere alleged that Belford was insane at the time of the transaction in question, or that he was of unsound mind, or that he was wholly incompetent to comprehend the nature of the transaction. All that is alleged is that Belford was not in fit condition to transact any business, and was unable to understand his acts or the effect thereof.

In *Aldrich v. Bailey* (132 N. Y. 87) it was held that in an action to set aside a deed on the ground of the insanity of the grantor, the complaint should allege that the grantor was "wholly and absolutely incompetent to comprehend and understand the nature of the transaction."

It not being here alleged that he was insane, or of unsound mind, or "wholly, absolutely and completely incompetent to understand and comprehend the nature of the transaction complained of," the complaint is insufficient.

4. There remains to be considered whether the complaint states a cause of action upon the ground of a fraud perpetrated upon Belford by procuring his intoxication and so rendering him incompetent to understand the effect of what he was doing. The equitable relief, if any, to which a party is entitled who has been induced by fraud to make a conveyance is a rescission of the contract.

Upon this branch of the case plaintiffs are to be considered as standing in the shoes of the defendant Belford, and the rule which would govern him, if he in his own name was seeking a rescission, must govern them:

The facts alleged show that defendant Belford has a right of action in equity to set aside the transaction in question on the ground of fraud. This right is a property right. When the defendants Jones and Moran fraudulently obtained title to the saloon property they became constructive trustees of this property for defendant Belford, and he has the same interest in this property as any other *cestui que trust* has in the property held by his trustee as such. This right is an equitable asset belonging to defendant upon which his judgment creditors have a right to realize by proceeding in equity. That the equitable assets of the judgment debtor may

be reached by the judgment creditor by an action in equity is settled law in this State. In *First National Bank v. Shuler* (153 N. Y. 171) the court said: "The rule is well settled in this State that the plaintiff in a creditor's action acquires by the commencement of the suit a lien upon the choses in action and equitable assets of the debtor which entitles him, in the successful event of the action, to priority of payment thereof in preference to other creditors."

In *Edmeston v. Lyde* (1 Paige, 637) the court said: "The debts, choses in action and other equitable rights of the defendants may be assigned or sold under the decree of this court so as to vest an equitable interest in the purchaser which will be protected both here and at law. * * * The principle being established that *every species* of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect."

The right in question is a chose in action which may be reached by a judgment creditor. In *Hudson v. Plets* (11 Paige, 180) the court held that a right of action for trespass *quare clausum fregit* could be reached by a judgment creditor, and said: "The right to an action for an injury to the property of the judgment debtor before the filing of the complainant's bill whereby the property to which the creditor was entitled to resort for the payment of his debt is destroyed or diminished in value, appears to be such a thing in action as may properly be reached and applied to the payment of the complainant's debt under a creditor's bill." That case was cited and approved in *Reilly v. Sicilian Asphalt Paving Co.* (170 N. Y. 44). It seems to me that that case is analogous to the one at bar. I can see no difference in principle between a legal and an equitable right of action for an injury to property, and if one can be reached in equity by a judgment creditor it seems to me that the other should.

But the complaint does not allege a precedent return of the consideration paid or an offer to return.

There is no doubt but that plaintiff must submit to a deduction of the amount actually paid by defendants for the property in question from the proceeds of a sale thereof, or if there be no sale he must pay this amount to defendants before he can have the property; for he who asks equity must do equity, and it has always

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been the law that upon the rescission of a contract on account of fraud the vendor must return to the vendee the amount paid by the latter. (*Allerton v. Allerton*, 50 N. Y. 670.)

Certain cases decided by the Court of Appeals, in distinguishing between an action at law upon a rescission and one in equity for a rescission, have held that in the latter action "it is sufficient" for the plaintiff to offer in his complaint to restore to the defendant what he has received, and that a tender of the same before suit brought is not necessary. (*Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Berry v. A. C. Ins. Co.*, 132 id. 55; *Vail v. Reynolds*, 118 id. 302.)

An offer to return the consideration has been held unnecessary when the judgment prayed for allowed a deduction of the same from the amount of the recovery. (*Allerton v. Allerton*, 50 N. Y. 670; *Harris v. Equitable Life Assurance Society*, 64 id. 196, 200.) These cases would seem to indicate that when the judgment prayed for does not allow a deduction of the consideration paid by the defendant there must be an offer in the complaint to return the consideration, and without such an offer the complaint is insufficient. In the complaint before us there is no such offer; indeed one of the prayers is that defendants pay to plaintiffs what they have already paid under the contract. Is this omission fatal?

Hay v. Hay (13 Hun, 315) is a case directly in point. It was there held that in an action to set aside a contract on the ground of fraud it was not necessary to offer in the complaint to return the consideration received by plaintiff. The court said: "A plaintiff who seeks equity must do equity. Therefore, if he asks the court to decree a rescission of his contract with a defendant for the fraud of the latter the court will not grant him the relief unless he restores whatever he has received from the latter, and which rightfully belongs to him. That condition will be imposed whether there be an offer to restore in the complaint or not. *It is, however, a condition of granting relief, not of instituting a suit.* It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made in the complaint, that such an offer is necessary. We think, therefore, that an offer to restore is not a necessary ingredient of the cause of action, and that a demurrer will not lie for the omission to insert such an offer in the

complaint." That case was followed in *Winterson v. Hitchings* (9 Misc. Rep. 322). *Kley v. Healy* (149 N. Y. 346) would seem to sustain the decision in *Hay v. Hay* (*supra*). It was there held that a judgment for plaintiff in an action to set aside a contract on the ground of fraud should be reversed for the reason that the plaintiff had not offered to restore the defendant to the position which he occupied at the time when the contract was made, "and the court in its decree has not provided for such restoration as a condition of awarding the relief demanded."

In *Halpin v. Mutual Brewing Co.* (20 App. Div. 590) it was said: "The proper course in equity in cases where the plaintiff seeks the rescission of a contract under which he has received property is to offer in the complaint to restore it to the defendant, *but such an offer is not indispensable*. The court in its decree may provide for restitution as a condition of granting the desired relief." (Citing *Kley v. Healy*, *supra*.)

Even though it is the rule that a complaint in an action of this kind should contain an offer to return the consideration received by plaintiff, it seems to me that this case can be brought within the exception to that rule which makes such an offer unnecessary where the relief prayed for allows defendant to retain the amount of his consideration.

This complaint contains a prayer for general relief, and it is a rule of equity pleading that where plaintiff mistakes the relief to which he is entitled in his special prayer, "the court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill." (Story Eq. Pl. [10th ed.] § 40; *Thompson v. Heywood*, 124 Mass. 401.) This being the case, the prayer for general relief may be considered as a prayer for the value of the property in question minus what has already been paid by defendants. With such a prayer it has been held that an offer to return the consideration is unnecessary. Upon this view of the cause of action, the complaint as against Jones and Moran is sufficient.

5. The complaint is also sought to be sustained as for a cause of action upon a sale in bulk of Belford's stock of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of his business without compliance with the pro-

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visions of the so-called sale in bulk statute, being chapter 569 of the Laws of 1904 (amdg. Laws of 1902, chap. 528).

We do not think that the facts bring this transaction within the provisions of said statute.

6. There were two decisions filed upon the two demurrers interposed, and upon such decisions two separate judgments were entered.

We find no provisions of law authorizing such practice. There should have been but one decision and one judgment determining the questions raised by the several demurrers. Each demurrant could, thereafter, have appealed from so much of the judgment as affected him. The practice followed was anomalous and should not be encouraged.

The judgment overruling the demurrer of Doelger should be reversed, with costs and disbursements to the appellant, with leave, however, to the respondents upon payment thereof within twenty days to make and serve an amended complaint. The judgment overruling the demurrer of Jones and Moran should be affirmed, with costs and disbursements to respondents.

PATTERSON, P. J., and HOUGHTON, J., concurred; McLAUGHLIN, J., concurred in result.

INGRAHAM, J. (concurring):

I concur with Mr. Justice CLARKE that, for the reasons stated, no cause of action is alleged against the defendant Doelger, but I do not concur in his conclusion that a cause of action is stated as against the defendants Jones and Moran. I can find no allegation that the transfer of the business by Belford to Jones and Moran was made to hinder, delay or defraud creditors, or that Jones and Moran purchased the property with that intent. The substance of the allegation is that Jones and Moran purchased the property of Belford for \$1,950, and that that property, including the good will of the business, was worth \$3,000.

It appeared that Belford was indebted to the defendant Doelger for a considerable amount, alleged in the complaint to be \$1,197; that Doelger owned the building and fixtures, which he rented to Belford from May 1, 1905, to May 1, 1906, at an annual rental of \$3,000, and Belford assumed a mortgage of \$10,000 held by Doel-

ger upon the premises; that on October 17, 1905, Doelger notified the defendant Belford that he must sell out and vacate forthwith and refused to accept a purchaser of Belford's business and good will who made an offer of \$3,500. Doelger was under no obligation to Belford's creditors to allow him to continue in possession of property for which, as appears from the complaint, he had not paid the rent due therefor, and had not paid Doelger for the supplies furnished to enable him to continue his business. It is quite evident that the purchaser of this business, including the good will, could not successfully conduct the business or continue in possession of the property without the consent of Doelger and he was not required to give such consent to any person or persons suggested by the lessee. He accepted Jones and Moran as purchasers. They were, therefore, entitled to purchase the property at what they considered a fair price, and that they made an advantageous purchase is no reason, in the absence of fraud, why they should be deprived of it.

This complaint, however, is sought to be sustained upon the allegation that after Doelger had notified Belford that he must sell out and vacate forthwith, and on October 18, 1905, a stranger called upon Belford and gave him several drinks of whisky; that thereafter Belford became totally unfit to discuss or consider any business proposition and was unable to understand his acts or the effect thereof; that thereupon the stranger offered him \$50 cash if he would sell his place, equipment, business and good will for \$1,950, and obtained from Belford his signature to a contract embodying such terms, paying said Belford \$50; that thereupon said stranger notified Belford that he was acting as agent in the matter for Jones and Moran and that the transaction would be closed at the office of the defendant Doelger, where Belford would receive \$1,900 and sign a bill of sale. The complaint then alleges that continuously after the signing of such contract Belford steadily drank alcoholic beverages and at no time between the signing of the contract and October twenty-first was he able to comprehend the nature of his acts or the effect thereof, which fact is apparent and well known to every person with whom he came in contact; that on October 20, 1905, Belford called at the office of Doelger, where the bill of sale was signed. Doelger paid him the amount

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due him from Belford, and the balance of the money was paid to Belford, who disposed of it by spending part of it and applying the balance to the payment of debts; that on October twentieth the representative of Jones and Moran took possession of the premises and Belford vacated the same.

Belford, so far as appears, never sought to disaffirm this transaction, but the plaintiffs, as his creditors, commenced this action in February, 1906, claiming to disaffirm this transfer upon the ground that the same was fraudulent and void as against the plaintiffs as creditors of Belford, or in the alternative to recover judgment against the defendants for the amount of Belford's indebtedness to plaintiffs.

It seems to be conceded that the plaintiff would be required to repay to Jones and Moran the amount that they paid to Belford before the transfer could be set aside. There is no allegation that Jones and Moran received any money or property out of the transaction, but simply that they obtained an assignment of this business, which included the good will, lease and fixtures, for a sum of money which was less than its real value. There is nothing to justify a personal judgment against any of the defendants for any sum of money, but it is claimed that the plaintiffs were entitled to have the sale set aside and a receiver appointed to take possession of the assigned property for the benefit of Belford's creditors. Belford makes no complaint, but his creditors seek to enforce a right that he had to set aside the transfer upon the ground that he was intoxicated and did not know what he was about. I do not see how it can be said that Jones and Moran were responsible for his intoxication, and the case must stand or fall upon whether these allegations are sufficient to show that Belford was incompetent by reason of temporary insanity caused by the excessive use of alcohol to make a valid transfer of his business.

Clearly, before such a transfer could be set aside, the plaintiffs would be compelled to repay the amount that Jones and Moran actually paid, and to sustain such an action, as I understand the rule, it is necessary to allege either a tender of the amount or a willingness to repay as a condition of the equitable relief asked for. It is held in the prevailing opinion, however, that a complaint is not demurrable because it fails to make an offer to return the con-

sideration received by the assignee. The case of *Hay v. Hay* (13 Hun, 315) is cited as an authority for that proposition. The complaint in that case alleged that while one James Hay, for whom the plaintiff was the committee, was insane and under the duress and restraint of the defendant, the latter extorted from him an agreement in writing, and on the same day, with fraudulent intent and unlawful coercion, induced him to execute a will, wherein defendant was named sole legatee and executor. Subsequently Hay was found a lunatic and defendant was appointed his committee; that the defendant, subsequently, by false representations induced the plaintiff to enter into an agreement with him, by which plaintiff waived all objections to the probate of the will, which was admitted to probate, and defendant qualified as executor and continued to act as such. Subsequently the defendant obtained by fraud a general release from the plaintiff, and the complaint demanded that these four instruments be adjudged to be void. There was here no allegation, so far as appears, that the plaintiff had ever received anything from the defendant or that there was anything that the plaintiff should be compelled to restore in order to entitle him to maintain the action. No authorities are cited in the opinion upon the necessity of an offer to restore money that has been actually received by a lunatic or incompetent person for the transfer of property, and from the report the question does not seem to have been presented.

The case of *Kley v. Healy* (149 N. Y. 346) is also cited as sustaining this contention, but I think it is an authority for the defendants. That was an action to set aside certain instruments executed by the defendant on the ground that they had been obtained by fraud. Judgment was entered at Special Term in favor of the plaintiff, which judgment was reversed by the General Term of the Court of Common Pleas (9 Misc. Rep. 93), and from the order of reversal the plaintiff appealed to the Court of Appeals. The reversal of that judgment was there sustained upon the ground that "the plaintiff has not offered to restore the defendant to the position which he occupied at the time when the agreement for settlement was made between them, and the court in its decree has not provided for such restoration as a condition of awarding the relief demanded." The reason given is in the conjunctive and not in the disjunctive, and it

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would appear to follow from what was said that an allegation in the complaint of an offer to restore was necessary to sustain any cause of action. There was a dissent in that case, but the rule stated in the prevailing opinion seems to have been conceded, the only dissent being upon the principle that the point should have been made upon the trial and not left to be first considered on appeal. That case was before the Court of Appeals upon a former appeal (*Kley v. Healy*, 127 N. Y. 555), where the complaint was dismissed upon the opening. That judgment was reversed upon the principle that "one who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain, either by virtue of the contract sought to be set aside or of the original liability. * * * While the sum retained should be taken into account in the award of relief, an offer to restore it is not a condition precedent to the bringing of an action to set aside the fraudulent release. * * * If her action failed, she was entitled to the sum received by virtue of the transaction itself. If she succeeded, the sum was less than she was concededly entitled to by the original judgment. In any event, therefore, she had only that which, without dispute, belonged to her, and a restoration, or the offer thereof, was unnecessary prior to the commencement of the action, for such conditions as might be essential to the protection of the defendant could be inserted in the judgment ultimately rendered."

In *Gould v. Cayuga County Nat. Bank* (86 N. Y. 75) the conditions under which a party may sue in case of transfer or agreement obtained by fraud is stated as follows: "One situated like the plaintiff can rescind by tendering or restoring what he has received, and then commence his action. He may keep what he has received and sue to recover damages for the fraud; or he may commence an action in equity to rescind and for equitable relief, offering in his complaint to restore in case he is not entitled to retain what he has received."

From these cases the rule in relation to these actions is settled. When a plaintiff sues at law he is bound to tender the amount that he has received before maintaining the action based upon a rescission of the conveyance thus obtained; or he may sue generally to recover damages for the fraud. He may also apply to a court of

equity to rescind. In equity where it appears that if he obtained the relief for which he asked he would not be entitled to retain what he received, he must, in his complaint, offer to restore the amount received as a condition of equitable relief.

In this case I think it clear that if Belford had commenced this action to rescind and repossess himself of the property assigned to Jones and Moran, he would have been compelled to repay to Jones and Moran the money that had been paid to him and which had been applied by him to the payment of his debts, or applied by him for his own purposes. It certainly would be inequitable for Belford or his creditors to obtain possession of the property for which Jones and Moran had paid \$1,950 and not repay to them the amount that they had paid and which had been applied by Belford to his own use. Plaintiffs, as his creditors, can certainly stand in no better position than he stood, and can obtain a rescission only upon the terms upon which he could insist upon such rescission. An allegation that plaintiff offered to restore is material, for although the plaintiffs claim that this property, including the good will of the business, was worth \$3,000, it is alleged that Jones and Moran actually paid \$1,950 for it. It does not appear that Doelger was bound to recognize any assignee of Jones and Moran as a tenant or allow them to continue in possession of the leased property. However much the plaintiffs might desire to recover the amount of Belford's indebtedness to them, there is nothing to show that they would be willing under these conditions to repay to Jones and Moran the amount that they had actually paid for the business. At any rate, Jones and Moran were entitled to receive that amount before the sale could be rescinded, and these plaintiffs could not maintain an action for the rescission of the sale without tendering either the amount that Jones and Moran had paid for the business, or offering in the complaint to make restitution.

For these reasons I think the demurrer should have been sustained.

As to defendant Doelger, judgment reversed, with costs, and demurrer sustained, with costs, with leave to respondents to amend on payment of such costs. As to defendants Jones and Moran, judgment affirmed, with costs. Settle order on notice.

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THE CITY OF NEW YORK, Respondent, v. WILLIAM P. BAIRD
and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Appellants.

First Department, February 25, 1907.

Principal and surety — evidence — good faith of municipality in settling action — when prior statements of principal to city authorities inadmissible.

A municipal contract required the contractor to indemnify the city against damages to person or property caused by his negligence. Before the trial of an action against the city and the contractor for personal injuries the contractor, having finished the work and desiring to be paid gave the city a bond of indemnity for \$10,000 to secure it against any judgment that might be obtained in the action. The plaintiff in that action recovered \$22,000, and pending an appeal by the city and the contractor the former settled with the plaintiff at a sum \$5,000 less than the judgment. In an action by the city against the contractor and the surety on his bond,

Held, that as there was evidence by the corporation counsel that he was of the opinion that the plaintiff was entitled to recover and that a new trial might result more unfavorably to the city and there being no evidence of bad faith on the part of the city in making settlement, a finding that the city acted in good faith was sustained by the evidence;

That statements made by the contractor to the city comptroller at the time the bond was given and two years prior to the settlement by the city that the contractor wished to carry the case to the appellate court were properly excluded, being too remote on the question of good faith on the part of the city authorities.

HOUGHTON, J., dissented.

APPEAL by the defendants, William P. Baird and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of May, 1904, upon the verdict of a jury, and also from an order entered in said clerk's office on the 24th day of May, 1904, denying the defendants' motion for a new trial made upon the minutes, with notice of an intention to bring up for review upon said appeal an order entered in said clerk's office on the 24th day of May, 1904, directing that there be included in said judgment the interest on the amount of damages awarded from the 10th day of October, 1899, to the 6th day of May, 1904.

The defendant Baird had a contract with the city of New York

to lay water mains, the contract providing that he should indemnify and save harmless the city against all actions and claims for injury to person or property resulting from his negligence in the performance of the work, etc. A person being injured brought action against Baird and the city. Baird having completed his contract before the trial of the action and wishing to be paid the money due under his contract, gave the city a bond of indemnity to secure it against any judgment obtained in said action. The injured person recovered judgment for a sum exceeding the amount of the indemnity and thereafter, pending an appeal by Baird and the city, the latter settled with the plaintiff in that action for a sum \$5,000 less than the judgment. This is an action by the city against Baird and his surety on the bond of indemnity.

A. Delos Kneeland, for the appellants.

Terence Farley, for the respondent.

INGRAHAM, J. :

Upon the former appeal in this case (176 N. Y. 269), which was from a judgment entered on a verdict directed for the plaintiff, the Court of Appeals held that "the city could not deprive the principal and his sureties of his right of review without taking the chances of loss should such review and a subsequent trial had by reason of it result favorably to the principal; that midway between the two extremes claimed by plaintiff and defendants lies the true position, and the test of it is, Was the action of the municipal authorities complained of taken in bad faith? If so, did it operate to the substantial injury of Baird and the surety? If the first question be answered in the affirmative, then the party indemnified cannot recover unless it shows that its action — found by the jury to have been taken in bad faith with the intention of injuring the principal or surety — did not operate to the disadvantage of either, or if it did to some extent, that after deducting the amount of damage done to them there still remained something due on the bond." Upon a retrial under this decision, therefore, the first question that was to be presented was, did the city act in bad faith? And then if the jury should find in the negative, it would seem to follow that the plaintiff was entitled to recover on the bond. On the other

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hand, if it should be found that the city did act in bad faith, which, I assume, means that the city acted in making the settlement without recognizing the rights of Baird and his surety which it was bound to recognize under the circumstances, then the question presented is whether or not the defendants were injured by the bad faith of the city. Here, the city stood in a position of having a claim against it for \$50,000, based upon the negligence of Baird and for which the city was entitled to hold the amount that was due to Baird under the contract. Baird wanted to get the money. If he had consented to allow the city to retain the money, the city would not have objected to his continuing the action as long as he pleased. He, however, to get the money, agreed to give to the city a bond for \$10,000, which secured it against any judgment that should be obtained in that action, and that bond was given. It was not conditioned upon a final appeal to the Court of Appeals, but upon Baird and the surety paying any judgment that should be obtained against the city in the action. The case was tried and resulted in a judgment against the city for over \$22,000, and neither Baird nor the surety paid the judgment, and never have paid it. Thus, the city had a judgment against it for \$22,000. If the liability of the city was established, even if a new trial was obtained, a much larger verdict might have been obtained, as the plaintiff's claim was for \$50,000. When an offer was made to the city to settle for \$17,000, the question was presented to the law officers of the city, who were bound to protect its interests as to whether or not such a settlement should be made. The attorney for Baird testified that he insisted upon the city continuing the appeal. There is a considerable disagreement between the assistant corporation counsel and the attorney for Baird as to just what position Baird's attorney took in relation to it; but that Baird's attorney knew of the negotiations pending and that there was a possibility of the case being settled appears beyond dispute by his affidavit, upon which he obtained an order for an extension of time to prepare the case on appeal, and the defendants made no offer to secure the city in the event of an affirmance of the judgment, or in the event of the plaintiff's obtaining a judgment in excess of \$10,000 if a new trial was ordered. We have the evidence of the assistant corporation counsel, who tried the case for the city, that in his

opinion the plaintiff in the action against the city would recover, and that even if a new trial was obtained the result of the new trial would not be more favorable to the city and Baird than was the trial that had been had which had resulted in a judgment against them. There is not, to my mind, a particle of evidence to dispute the fact that the law officers of the city did actually and in good faith believe that the settlement was an advantageous one for both the city and Baird. One jury had found the city liable for the negligence which had resulted in the injury to the plaintiff in that action; and while it is possible there might have been errors on that trial which would insure a new trial, there is nothing in the record to show that the final result in the action would not have been a judgment in favor of the plaintiff for the injuries that it has sustained, and no one can tell but that upon a new trial the verdict would have been in excess of that awarded against the city on the first trial.

I cannot see how it is possible to say that upon this evidence the finding that the city did act in good faith was not sustained by the evidence. The Court of Appeals in reversing the former judgment held that the question of the good faith of the city officials in making the settlement was a question of fact for the jury; and the question as to the plaintiff's good faith has been submitted to the jury and I do not think that we should interfere with the verdict. The defendants strenuously insist that the ruling of the trial court in excluding conversation between the comptroller and Baird at the time the bond was executed was erroneous and that the conversation was competent evidence as against the defendants. The attorney for the defendant Baird was on the stand and was asked: "Did you have any conversation with the Comptroller or with Mr. Blandy about the time this bond was given with reference to the attitude of Baird, the defendant, with reference to the Kelly claim and the action proposed to be brought thereon?" That question was excluded and the defendant excepted. He was then asked what that conversation was, which was also excluded; and the same question was asked to any conversation with Mr. Blandy at about the time of giving the bond. This conversation was at the time the bond was given. It certainly could not be relevant in an attempt to vary the condition of the bond, or for the purpose of affecting the construction to be given to it. The bond

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was dated February 2, 1898. The action against the city by Kelly was commenced on February 28, 1898. The judgment was obtained on May 5, 1899, and the judgment was satisfied on March 19, 1900. This conversation, therefore, was more than two years prior to the time of the satisfaction of the judgment, and at the time it was offered there was no evidence bearing on the good faith of the city officials in making the settlement. In making the ruling, however, the court did not finally hold the evidence not admissible, but stated that he would exclude it at that juncture of the case; that it was necessary first for the defendants to attack the good faith of the plaintiff's officials; to show the circumstances attending the conduct of the defendant after the rendition of the verdict; show what the defendants wanted the city to do, and that the court could then see whether it was material on the question of good faith. The objection was then sustained with leave to ask the question again if the defendants were disposed to. Subsequently, after the defendant Baird's attorney had been examined, he was asked by counsel for the plaintiff to state what else was said by the comptroller and himself prior to the execution of the bond when the comptroller stated that the amount of the balance due the defendant Baird would not be paid unless the bond was given. At first the court seemed to overrule the objection, but subsequently, upon counsel for the plaintiff stating that he meant to show that he wanted to carry the case to the appellate court, the court sustained the objection, to which the plaintiff excepted.

It seems to me that a statement to the comptroller some time before the bond was executed and before the trial of the action against the city that the defendant Baird wanted to carry the *Kelly* case to the appellate court was quite immaterial as to the good faith of the law officers for the plaintiff in settling the case after the verdict had been obtained against the city. Assuming that any statement as to what was said to the corporation counsel or his assistant at that time would have been material as bearing upon the act of the law officers for the plaintiff in determining upon the settlement, the mere statement of Baird's intention before the bond was executed to the comptroller seems to be too remote as not bearing upon the good faith of the law officers of the plaintiff who made the settlement. A casual statement of this kind

to the comptroller, over two years before the case was settled, would not certainly be notice to the city of any fact which could bear upon the good faith of counsel for the corporation in making the settlement.

There is no other question which, I think, requires discussion. The case was submitted to the jury exactly as the Court of Appeals said it should be and the jury has found a verdict that, in my view, is sustained by the evidence, and the judgment appealed from should, therefore, be affirmed, with costs.

PATTERSON, P. J., and LAMBERT, J., concurred; LAUGHLIN, J., concurred in result; HOUGHTON, J., dissented.

Judgment affirmed, with costs.

ALFRED NATHAN, Appellant, v. JOHN H. O'BRIEN, as Commissioner of Water Supply, Gas and Electricity of the City of New York, and Others, Respondents.

First Department, February 25, 1907.

Municipal corporations — proposals for contract for pumping engines — requirement that bidder give evidence of ability to perform — when interested taxpayer cannot restrain acceptance of bid.

A provision in proposals for a municipal contract for pumping engines that the bidders shall give satisfactory evidence that they have built the type of engines required and are able to complete the work as specified, is for the benefit of the city and intended to exclude irresponsible bidders unable to complete the contract. It is not for the benefit of other or higher bidders, nor does it bind the city to reject bids because the bidder does not fully comply with the express requirements as to proof of ability to perform.

Thus when the lowest bidder has permitted the city engineer to investigate the pumps supplied by it to other public works, and the municipal authorities decide to accept the bid, a taxpayer who is connected with a bidder \$68,000 in excess of the bid accepted cannot enjoin the letting of the contract on the theory that the lower bidder did not give adequate proof of ability to perform, where there does not appear to be any other person who refrained from bidding by reason of the provision aforesaid.

Taxpayer's actions are brought to allow the illegal acts of public officials to be controlled by courts and to protect the corporation. They are not allowed for the purpose of enabling corporations or individuals to require the award of a public contract on bids in excess of those made by other competent and responsible bidders.

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When it appears that such action is not brought for the interest of the municipality but for the ulterior purpose of imposing an additional burden on the municipality by an interested taxpayer, a court of equity will not enjoin the letting of a contract to a bidder who is responsible.

APPEAL by the plaintiff, Alfred Nathan, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of December, 1906, denying the plaintiff's motion to continue *pendente lite* an injunction theretofore granted herein.

Samuel Untermeyer, for the appellant.

Theodore Connolly, for the respondents O'Brien and the City of New York.

Henry D. Hotchkiss, for the respondent Davis & Farnum Manufacturing Company.

INGRAHAM, J.:

The defendant O'Brien, as commissioner of water supply, gas and electricity of the city of New York, advertised proposals for bids to furnish four pumping engines for the city of New York. The advertised proposals for bids provided that "Each bidder shall submit with his bid or estimate evidence that will prove to the satisfaction of the Commissioner that he is prepared to furnish all the necessary materials, possesses the necessary plant and means, to complete all the work in the manner and time herein specified. Neither experimental nor unused types of engines will be accepted. Each bidder must be able to prove that he has built vertical engines, either triple or compound, with cylinders supported either on single 'A' frames or double 'A' frames. These engines shall be of the same general type, although not necessarily of the same capacity as the engines he proposes to furnish, and the bidder shall state where these engines have been or are being installed." Several bids were received, of which the bid of the defendant Davis & Farnum Manufacturing Company was for \$340,000, the lowest that complied with the proposals. The next bid was for \$348,000, but that bid was withdrawn, and then came a bid of the Holly Manufacturing Company of Buffalo, New York, of \$408,000, \$68,000 in excess of the bid of the Davis & Farnum Manufacturing Company.

Other bids were received which were higher. These bids were opened on July 25, 1906. After the bids were received the Davis & Farnum Company was required to produce the proof required in the proposals for bids. The engineers of the city of New York visited their manufacturing establishment and investigated the pumps that they had supplied for other public works, and upon the report of the engineers the commissioner decided to accept the bid of the defendant Davis & Farnum Manufacturing Company. Whereupon a taxpayer who was connected with the next highest bidder, \$68,000 in excess of the bidder whose bid was accepted, commenced this action as a taxpayer to restrain the city from awarding the bid to the lowest bidder upon the ground that the bidder whose bid was accepted did not furnish the proof which should have satisfied the commissioner as to their ability to furnish the engines, or that it had never built vertical engines, either triple or compound, with cylinders supported either on single "A" frames or double "A" frames.

Thus, a taxpayer, under statutes (Code Civ. Proc. § 1925; Laws of 1892, chap. 301; Greater N. Y. charter [Laws of 1901, chap. 466], § 59) which authorized a taxpayer to apply to the court to prevent waste or misappropriation of the city's money or property, seeks to prevent the city from making a contract with a bidder, who was required to give a bond in the sum of \$250,000 to secure the faithful performance of its contract, so that the city will be compelled to purchase of a corporation with which the taxpayer is connected the same property and pay \$68,000 more for it. All this is done in the interest of the taxpayers and the city. This particular taxpayer, assumingly acting for the benefit of the corporation with which he is connected, seeks to use statutes which are designed for the protection of taxpayers and municipal corporations to impose upon the municipal corporation an expenditure of \$68,000 more than the city will have to expend if the contract based upon the accepted bid is completed. The plaintiff, upon these facts, comes into a court of equity and asks that the court enjoin the city and the city officials from making what they consider an advantageous contract because the lowest bidder has not produced to the commissioner evidence which should satisfy him that it is able to perform its contract. These

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provisions in the proposals are for the benefit of the city and to exclude irresponsible bidders who are unable to complete such a contract if it should be awarded to them. It is not for the benefit of other or higher bidders; nor does it purport to bind the city to reject any bids of persons who do not fully comply with the proposals as to the nature of the proof that is to satisfy the commissioner. It is claimed that the city has been injured because many other bidders who could not furnish the proof to the commissioner that he required were prevented from bidding and that it was, therefore, a fraud upon all the bidders and a fraud upon the city to insert such a provision unless the commissioner intended to strictly enforce it. No bidder, however, is produced who has stated that but for this provision he would have made a bid, and there is no evidence to show that there are any manufacturers anxious to perform work of this kind or who would have made bids for this work but for this provision of the proposals. Before it can be assumed that the action of the city officials in waiving a strict compliance with this provision, if such a compliance was waived in this case, was fraudulent or caused damage to the city, there must be some proof to justify the court in finding that a bidder was prevented from making a bid by this provision of the proposals. The statutes under which these taxpayers' actions are brought are to allow the acts of public officials to be controlled by the courts when the action is illegal or will impose upon the municipal corporation or the public burdens in excess of that which should be borne. They are not passed for the purpose of enabling corporations or combinations of individuals to compel the city to award contracts which will require the payment of an amount in excess of that for which competent and responsible bidders can be obtained to do the work. A court of equity is certainly justified in refusing to grant an injunction where it is perfectly apparent upon the face of the papers that the application is not made for the purpose of protecting the taxpayers or a municipal corporation, but for an ulterior purpose which will impose an additional burden upon a municipality, and while an act which is clearly illegal, although it might be to the advantage of the municipal corporation, will be enjoined, a mere failure of a public officer to exercise a discretion in such a manner as will impose a large additional cost upon

a municipality should never be enjoined. Upon the conceded facts of this case this application is not made in good faith to protect the city or the taxpayers, but to compel the city officials to accept a bid largely in excess of that which the public officers have accepted and impose additional burdens upon the city of New York. Of course the court would have the power at any time to restrain the action of the city officials to so use such a provision as to prevent competent persons from making bids or to enable the city officials to award contracts to favored bidders, and the court would not hesitate to enjoin the awarding of any contract based upon a bid where there was proof to justify a finding of such an intent, but certainly the court will not award an injunction which would have the effect of compelling the city to award a bid at a much higher price than that to be paid to a successful bidder upon the assumption without proof that other bidders were prevented from bidding because of the insertion of a provision of this kind in a proposal for a public contract.

I think the order appealed from should be affirmed, with ten dollars costs and disbursements.

LAUGHLIN, HOUGHTON and LAMBERT, JJ., concurred; PATTERSON, P. J., concurred in result.

Order affirmed, with ten dollars costs and disbursements. Order filed.

HERMAN SUESENS and ELIZABETH HEIMSOTH, as Trustees under the Last Will and Testament of FREDERICK HEIMSOTH, Deceased, and as Executors and Trustees under the Will of MATILDA S. DAIKER, Deceased, Respondents, v. HERMAN G. DAIKER, Appellant, Impleaded with GEORGE F. DAIKER, JR., and Others, Defendants.

First Department, February 25, 1907.

Parent and child — will providing for support of minor — income applied when father unable to support infant.

When a will creates a trust for the maintenance and support of an infant during his minority, accumulations and principal to be paid over on his arriving at majority, the trustees may be ordered to apply such portion of the income as is necessary to the support and maintenance of the infant, if the father has not sufficient financial ability to properly care for him.

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APPEAL by the defendant, Herman G. Daiker, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of December, 1906, denying the said defendant's motion that the plaintiffs, as trustees and executors, be directed to pay certain moneys for the maintenance of said defendant.

Simeon Sultan, for the appellant.

Cyrus C. Miller, for the respondents.

HOUGHTON, J.:

Appellant is an infant whose mother died leaving a last will and testament of which respondents are executors and trustees, which provided that the residue of her estate should be invested and the income applied to the maintenance and support of appellant during his minority, and on his arriving at the age of twenty-one years any accumulations from the income and the principal to be paid over to him or his issue.

The moving papers disclose that the appellant is only three years of age and in such ill and unfortunate condition that he requires more than ordinary care. The motion was for an order directing the executors and trustees to apply the income, which amounts to about \$1,500 per annum, and what has accumulated in the hands of the trustees, to the payment of past expenses incurred in the care of appellant, and for the fixing of a sum to be regularly paid in the future for his support and maintenance. The motion was denied on the ground that the papers did not disclose the financial inability of the father to adequately support his child.

The language of the will of the mother shows her intention that her child or children should be supported from the income of her residuary estate if there was a necessity to resort to such a source. If the earning capacity and financial ability of the father is inadequate to properly care for appellant, such part of the income as is necessary should be applied to that purpose.

On another motion the facts and circumstances can be fully developed, and to that end we think the order should be modified by permitting a renewal of the motion upon additional papers.

We express no opinion with respect to the propriety of paying

past expenditures. That matter can be determined when it more fully appears how they were incurred, and for what and by whom paid.

The order should be modified by giving the appellant leave to renew on additional papers, and as so modified affirmed, without costs.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and LAMBERT, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, without costs. Settle order on notice.

ELLEN COFFEY, as Administratrix, etc., of PATRICK COFFEY, Deceased, Appellant, v. NEW YORK CITY RAILWAY COMPANY, Respondent.

First Department, February 25, 1907.

Appeal from order — opinion below not considered.

On an appeal from an order setting aside a verdict, it is the order which governs the appellate court and not the opinion of the court below.

APPEAL by the plaintiff, Ellen Coffey, as administratrix, etc., from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 2d day of April, 1906.

Frederick Hulse, for the appellant.

Joseph F. Daly, for the respondent.

HOUGHTON, J.:

The order setting aside the verdict and granting a new trial, from which the plaintiff appeals, recites that the motion was made upon the ground, amongst others, that the verdict was against the weight of evidence.

In a memorandum opinion, the learned trial court stated views respecting the case, in which we do not concur. It is the order, however, which governs our consideration of the appeal and not the opinion. Treating the motion as made upon the ground that

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the verdict was against the weight of evidence, as we must, the facts disclosed by the record are such that we do not feel justified in interfering with the discretion exercised by the trial court in making such an order.

The order granting a new trial is, therefore, affirmed, with costs.

PATTERSON, P. J., LAUGHLIN and LAMBERT, JJ., concurred ;
INGRAHAM, J., concurred in result.

Order affirmed, with costs. Order filed

EDWIN F. HATFIELD and Others, Appellants, v. ISIDOR STRAUS and
NATHAN STRAUS, Doing Business under the Firm Name and
Style of R. H. MACY & COMPANY, and Others, Respondents.

First Department, February 25, 1907.

**Municipal corporations—grant of right to build private railroad in city
of New York unauthorized.**

The board of estimate and apportionment of the city of New York is without authority to grant to private persons the right to construct a private railroad on or under the city streets for the sole purpose of transporting their own goods.

The amendments to sections 17, 28, 41, 43, 44, 45, 47, 48, 50, 72, 73, 74, 75 and 242 of the charter of Greater New York, made by chapter 629 of the Laws of 1905, deprived the board of aldermen of the power to grant franchises to construct and operate railroads in the city streets and conferred that power solely upon the board of estimate and apportionment.

Said amendments did not grant any new powers to the board of estimate and apportionment not theretofore possessed by the board of aldermen in relation to the granting of such franchises.

Said section 242 of the revised charter confers no authority on the board of estimate and apportionment to grant to a private person or corporation the right to build such private road, for all the powers conferred by that section may be exercised solely for the benefit and in the interest of the public at large.

Such special privilege cannot be granted whether it be considered as a franchise or not; or whether the grantee does not intend to act as a common carrier for the benefit of the public.

The power to make such grant was not heretofore possessed by the board of aldermen or other local authority and was not transferred by the legislation aforesaid to the board of estimate and apportionment.

Such grant is unauthorized because it takes public property for private use.

When said board of estimate and apportionment has granted to a private person the right to build and maintain such private railroad, an adjoining owner whose access to his property will be invaded by the tracks and whose property will be diminished in value thereby may sue for a permanent injunction.

The plaintiff under such circumstances is entitled to an injunction *rendente lite*, and the decision as to his right thereto should be made before the road is built and not afterwards.

INGRAHAM and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by the plaintiffs, Edwin F. Hatfield and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of December, 1906, denying the plaintiffs' motion for an injunction *pendente lite* and vacating a preliminary injunction theretofore granted.

Arthur H. Masten of counsel [*Masten & Nichols*, attorneys], for the appellants.

Edmond E. Wise, for the respondents Straus.

Theodore Connolly, Louis H. Hahlo with him on the brief, [William B. Ellison, Corporation Counsel], for the respondents City of New York and others.

CLARKE, J.:

The plaintiff are the owners of the premises No. 149 West Thirty-fourth street, which have been used and occupied by them for many years past as a private dwelling. The defendants Straus, doing business under the firm name of R. H. Macy & Co., are the lessees of the premises on the northwest corner of Broadway and Thirty-fourth street, eastward of and immediately adjoining plaintiffs' property, and occupy the same for the purposes of a large department store.

Upon the application of R. H. Macy & Co. the board of estimate and apportionment of the city of New York, on the 6th of July, 1906, approved by the acting mayor on July 13, 1906, adopted a resolution which provided in part as follows: "That the consent of the corporation of the City of New York be and the same is hereby given to the firm of R. H. Macy & Co., doing business on Broad-

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way, West Thirty-fourth and West Thirty-fifth Streets, to construct, maintain and use two-spur surface railroad tracks located as follows: First, a spur track to be operated by the underground electric system from the northerly surface railroad track in West Thirty-fourth Street between Broadway and Seventh Avenue in the Borough of Manhattan, to their store on the northerly side of West Thirty-fourth Street. * * * The consent hereby given is for the exclusive use of the grantee and shall not be assigned, either in whole or in part, or leased or sublet in any manner, nor shall title thereto, or right, interest or property therein, pass to or vest in any other person or corporation whatsoever, either by the acts of said grantee, its successors or assigns, or by operation of law, without the consent in writing of the City of New York, acting by the Board of Estimate and Apportionment or its successors in authority. * * * The spur tracks to be constructed in West Thirty-fourth Street shall be operated only by the underground electrical system. * * * The railroad tracks constructed under this consent shall be maintained and operated solely for the purpose of the transportation of goods, wares, merchandise and for no other purpose, and especially for no purpose in connection with passenger traffic as commonly understood."

The moving papers show that the said spur railroad tracks will connect with the northerly surface railroad tracks in West Thirty-fourth street at a point almost directly in front of the premises owned by the plaintiffs and, ascribing the arc of a circle, will traverse that portion of the street between the surface railroad tracks and the curb, and thence will traverse the sidewalk within about fifty feet of the east boundary line of the plaintiffs' premises for the entire distance from the curb to the building line and will there run into a court within Macy's building.

The purpose of the construction is to permit the running of express or freight cars into Macy's store, there to be loaded exclusively with Macy's goods; the cars when loaded to be run back upon the track of the City railroad and thence transferred to the borough of The Bronx to Macy & Co.'s distributing station there.

Plaintiffs brought this action for an injunction, and are supported

by affidavits of the owners of the premises known as 151, 153, 155, 157, 159, 161, 163, 165, 167 West Thirty-fourth street, and the owners of the premises located on the northeast corner of Thirty-fourth street and Seventh avenue; that is to say, the owners of all the property on the north side of Thirty-fourth street from Macy's store to Seventh avenue unite in opposition to the construction of this private railroad.

A preliminary injunction was granted by the Special Term, but the motion to continue the same during the pendency of the action was denied and said injunction vacated, and from said order this appeal is taken.

What is involved in this case is a question of power. If the board of estimate and apportionment had the power to grant to R. H. Macy & Co., a private copartnership, engaged in the selling of goods, the privilege to construct, maintain and use for its exclusive use a railroad track operated by the underground electric system, for twenty-five feet say, in the roadway of a public street, and entirely across the thirty feet of public sidewalk, it has the power to grant a similar privilege to every owner or lessee of property in the city of New York. If an apartment house, a store or a manufactory, or a club should be located near the end of one of the long crosstown blocks of the city, and should deem it advisable for its own exclusive purposes to have a railroad connection by a spur with a north and south-bound track of an existing street railroad company on the avenue at the other end of the block, the board would have the power to permit it to construct, maintain and use said spur over the roadway of the street for five hundred feet. If the board has the power to permit this private railroad spur to be constructed across the sidewalk into Thirty-fourth street, it has the power to permit it to be constructed lengthwise with the sidewalk to connect with the avenue. If it is advantageous to R. H. Macy & Co. to have this personal and exclusive privilege, it cannot be doubted that other large department stores, of which there are very many in the city, would find it of the same advantage, and, as it cannot be presumed that R. H. Macy & Co. are any special favorites of the board of estimate and apportionment, it must, upon like application, impartially grant to all applicants a similar privilege.

While the argument of convenience and propriety is not conclusive

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on the question of power, yet, when a novel and, as it seems to me, dangerous innovation is about to be inaugurated in the use of the city streets, it is important to look the question fairly in the face and see where the logic of the situation inevitably carries us. The argument *ab inconveniente*, of course, cannot prevail against a settled rule of law or construction; but in doubtful cases *argumentum ab inconveniente plurimum valet in lege*. (Broom Leg. Max. [7th ed.] 146.)

It is conceded, upon this record, that the necessary process to obtain a franchise for a surface railroad in the public streets was not taken, but the respondents say this is not a franchise, this is not a street railroad, it is not to be used as a common carrier of passengers. It is personal, exclusive and private, and, therefore, the provisions in regard to the granting of franchises to surface railroads do not apply. The respondents claim that section 242 of the revised charter of Greater New York (Laws of 1901, chap. 466, as amd. by Laws of 1905, chap. 629) grants the power.

A careful examination of the provisions of the charter, together with the Rapid Transit Acts, discloses that before the legislation of 1905 the board of aldermen had the power to grant, from time to time, to any corporation thereunto duly authorized, the franchise or right to construct and operate railways in, upon, over and along streets in the city of New York, and wherever the consent of the local authorities was necessary to the location of the route or routes of the railways under, over, upon, through and across any of the streets of the city of New York, the board of aldermen was the local authority vested with the power to give such assent for the city. It is common knowledge that such being the law such conditions existed in the attempt to procure from said board the necessary consents in regard to large schemes of public improvements in the way of transit facilities that the Legislature was appealed to, and as a result thereof a series of laws was enacted by the Legislature of 1905, whose object and intent, by reason of alleged abuses, was to take from the board of aldermen its power over the conferring of such franchises and the giving of such consent and to confer said power upon the board of estimate and apportionment.

Chapter 629 of the Laws of 1905 amended sections 17, 28, 41, 43, 44, 45, 47, 48, 50, 72, 73, 74, 75 and 242 of the Greater New York

charter and each one of the amendments was intended to deprive the board of aldermen of said power and to confer it upon the board of estimate and apportionment; in many instances by a mere substitution in the statute of the board of estimate and apportionment for the board of aldermen, and in the case of section 242 by a new provision intended to cover the question. The next to the last section, 15, of said chapter 629 has this side note: "Application of this act," and provides that "This act and all the amendments hereby made to the sections thereof hereby amended shall be applicable to every grant, franchise or contract heretofore made, authorized or issued by the said board of rapid transit railroad commissioners, but not yet consented to by the common council or board of aldermen of the city, as well as to all grants, franchises or contracts hereafter made, authorized or issued by the said board of rapid transit railroad commissioners." Chapter 630 of the Laws of 1905 further amended section 74 of the revised charter. Chapter 631 of the Laws of 1905 amended chapter 4 of the Laws of 1891, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," in harmony with this new scheme, and substituted the board of estimate and apportionment for the board of aldermen as being the board constituting the "local authorities" whose consent was necessary to a route chosen by the board of rapid transit railroad commissioners, the final clause of the said amended section 5 being, "and the consent of such board of estimate and apportionment and the mayor, without the consent of the common council, board of aldermen or other board or officer of the city, shall be the only consent of local authorities required hereunder."

The purpose and design of this legislation, apparent in every line thereof, was not to grant new, unheard of and unknown powers to the board of estimate and apportionment, but simply to transfer to that board those which had theretofore been possessed and alleged to have been misused by the board of aldermen in relation to the granting of franchises and the location of routes by public service corporations, in the interest of the public.

Section 242 of the revised charter, as thus amended, provides that "The board of estimate and apportionment shall hereafter, except in the cases where franchises, rights or contracts shall be granted or authorized pursuant to the Rapid Transit Act, chapter four of

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the laws of eighteen hundred and ninety-one, and the amendments thereof, have the exclusive power in behalf of the city to grant to persons or corporations franchises or rights or make contracts providing for or involving the occupation or use of any of the streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers, or public grounds or waters within or belonging to the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power;" provided the same shall not be operative until separately approved in writing by the mayor after the action of said board. Every one of these enumerated purposes are for the benefit of and in the interest of the public at large. And, again, in said section, the said board is designated "as the local authority having the control of such" streets, etc., whose consent is necessary in proceedings under chapter 4 of the Laws of 1891 or the acts amending the same, and the last paragraph of the section is, "Hereafter no consent or approval of any such determination, conclusion, route, plan, specification, right, franchise or contract by the board of aldermen or any department or officer of the city shall be necessary," referring to the consent required by the local authorities to the plans of the rapid transit railroad commissioners.

The other provisions of law in regard to the granting of franchises must be read in connection with these amendments and the sole result thereof, as it seems to me, is simply to transfer the powers theretofore had over such subjects from the board of aldermen to the board of estimate and apportionment, and, therefore, if the permit given in this case is to be considered as given under these provisions of the amendatory acts of 1905, then a franchise or grant for a surface railroad has been given and the provisions of law as to the granting of such franchise have not been complied with. But, say the respondents, we do not claim to have a franchise; we do not intend to act as a common carrier; we do not propose to run a surface railroad for the benefit of the people. What we have is a personal, private and exclusive right to construct, maintain and use a private track on a portion of the public streets and sidewalk thereof, vested in the city to hold as

trustees for the use of all the people of the State as a public highway.

It seems to me that no power to grant such a right was ever conferred by law, or possessed by the board of aldermen or any other local authority, and hence could not be and was not transferred by this legislation from the board of aldermen to the board of estimate and apportionment, and, as an independent proposition, that no such power could be or has been created by this legislation and conferred upon the board of estimate and apportionment. The only ground upon which surface railroads were ever permitted to be laid in the public streets, the only reason authority was ever conferred upon a corporation to occupy for the purpose of making money for itself a portion of the public streets, was that it was a legitimate street use for the benefit of all the traveling public. But the moment such a right is given for the exclusive use of a private individual, there has been a taking of public property for private use which cannot be justified. The streets of the city of New York belonging to all the people have been subjected to many invasions for the benefit and use of private owners. Of late years it has been realized by the courts how dangerous such invasions have been, and in *Ackerman v. True* (175 N. Y. 353), and in *McMillan v. Klaw & Erlanger Co.* (107 App. Div. 407), and in *Williams v. Silverman Realty & Construction Co.* (111 id. 679), the Court of Appeals and this court have announced the doctrine that the board of aldermen or other local authority having control over the streets for certain purposes, had no power to permit invasion thereof for private use, and if there was any local legislation which could be invoked as an authority in that regard, it would be unconstitutional as attempting to authorize either the taking of private property for private use, or the taking of public property for private use.

So far as I have been able to find, no such invasion of the public streets for purely private purposes, as in the case at bar, has ever been sanctioned. In the case of *Fanning v. Osborne* (102 N. Y. 441) a street railroad corporation made a contract with defendant granting to him the right to run freight cars over a portion of its route into his premises for his private use, defendant to pay the expense of laying the new track and keeping the same in repair. In an action to restrain such use, by an abutting property owner, it

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was held that the facts found showed a special injury sustained by the plaintiff from the operation of the railroad which justified the interference of equity; that such use of the street was a nuisance which should be restrained and this without regard to the question whether the defendant had a title to or interest in the soil of the street. The unanimous opinion of the court, written by ANDREWS, J., said: "The right to construct and operate a street railway is a franchise which must have its source in the sovereign power. The legislative power over the subject is also subject to the limitation that the franchise must be granted for public and not for private purposes, or at least public considerations must enter into every valid grant of a right to appropriate a public street for railroad uses. The construction and maintenance of a street railway by any individual or association of individuals without legislative authority, would constitute a public nuisance and subject the persons maintaining it not only to indictment, but also to a private action in favor of any person sustaining special injury. * * * It is plainly contrary to public policy that a franchise granted for public purposes should be used as a mere cover for a private enterprise." It makes no difference in principle that in the case last cited the tracks were longer than those proposed to be laid in the case at bar. With the exception of the length of the road, the cases seem to be on all fours. In the *Fanning* case there was the right to run freight cars over a portion of its road into his premises for his private use, defendant to pay the expense of laying the new tracks and keeping the same in repair. Substitute express for freight cars and we have the exact situation presented in the case at bar.

The doctrine of this case that the franchise must be granted for a public and not for a private purpose was reasserted in *Paige v. Schenectady R. Co.* (178 N. Y. 115), citing the *Fanning Case* (*supra*).

In other jurisdictions the proposition that streets and highways are intended for the common and equal use of all citizens and that an appropriation of them for private individual uses is a perversion of them from their lawful purposes and cannot be authorized has been frequently applied to the laying down of railroads in the streets for the private use and benefit of an individual. In *Glaessner v. Anheuser-Busch Brewing Assn.* (100 Mo. 508) the corporate

authorities of St. Louis, by ordinance, gave to the brewing association the right to lay down and operate a single or double railroad switch from its brewery through and across public streets to the Mississippi river, about a quarter of a mile away. The plaintiff, owning a store seventy or more feet away from the place where the proposed track crossed a thoroughfare, procured an injunction against the city and the mayor. The court held that the city under its general power to regulate the use of the streets had no power to legalize the construction and operation of railroads therein for private purposes only.

In *Gustafson v. Hamm* (56 Minn. 334) an injunction against maintaining and operating a spur railroad running through the public street was directed. It was shown that there would be an average of only one train a day, taking about one minute to cross the street. The court said: "The city had no right or authority to grant defendant a license to construct and operate a purely private railroad upon or across a public street."

In *Heath v. Des Moines & St. L. R. Co.* (61 Iowa, 11) the court held: "We do not think the statute confers upon the city council authority to devote the streets or alleys to a railway track for the private benefit simply of an individual."

In *State v. Trenton* (36 N. J. Law, 79) the common council of the city of Trenton passed an ordinance permitting two individuals to construct a railroad track across a public street from a canal to their land on the other side of the street. The track was to be used for the carriage of lumber from the canal to their property. The prosecutors, who were residents and land-owners on said street, denied the power of the common council to pass the ordinance. The court said: "If they (referring to the common council) can license one to build a railroad across the highway for his own exclusive benefit, of which the public can have no user or advantage of convenience, it is difficult to perceive why they cannot empower another to place therein a structure which will more effectually impede the public passage and maintain it there during their pleasure. * * * The right to license one necessarily implies authority to license all, and thus municipal corporations under the general power to regulate streets become the source from which franchises to favored individuals

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in the public ways derive their existence. Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private individual uses from which the public derive no convenience, benefit, or accommodation, is not a regulation, but a perversion of them from their lawful purposes, and cannot be regarded as an execution of the trust imposed in the city authorities."

In *Mikesell v. Durkee & Stout* (34 Kan. 509) the court had under consideration an injunction to restrain defendants constructing and operating a railroad in a public street in front of the plaintiff's lot in Ft. Scott, Kan. Defendants were not a corporation nor common carriers. Their object in constructing the railroad was entirely for their own individual purposes and to enable them to better carry grain, etc., to and from their elevator, to and from the Missouri Pacific railroad, not far from the elevator. The court said: "We think it may be laid down broadly and upon general principles that no city has any right or authority to give permission to any individual or corporation to construct or operate a purely private railroad upon any of the public streets of the city. * * * Any abutting lot owner whose property is or may be injured by it may maintain an action to perpetually enjoin each person or corporation from making such use of the street."

Upon reason and authority, therefore, I reach the conclusion that there is no power lodged in the board of estimate and apportionment or any other local authority to grant the permit here under consideration. I have no doubt of the plaintiffs' right to sue. The switch for the spur is in front of their property, which is next to the Macy store. The access to their property is over the sidewalk from the east, which sidewalk will be invaded by the tracks and slot of the constructed spur, and as they pass to and fro from their property they will have to keep a lookout for and be in danger of the cars shunted out by electricity from the building. There is evidence in the case that the proposed construction and the proposed use will seriously damage the value of their property.

In *Callanan v. Gilman* (107 N. Y. 360) the Court of Appeals held, in an action brought to restrain the use of certain skids by the defendant across the sidewalk, that the plaintiffs had a right to bring the action, although the bridge, when used by the defendant, was

thirty-five feet from the plaintiffs' store, and that the plaintiffs suffered damage for the nuisance, which was not common to other persons having occasion to use the street. From the cases cited, where in the case of railroad tracks, the right to sue was upheld in the case of property owners abutting upon the street, or even as far away as seventy feet from the street proposed to be crossed by the railroad tracks, I think enough has been alleged to sustain the plaintiffs' right of action.

It seems to me that the preliminary injunction should have been continued and made permanent during the pendency of the action.

Among the papers are reports by various officers of the city, in which it is stated that this is the first instance where an application has been made for the granting of such a privilege, and in which reasons are presented on broad views of public policy why it ought not to be granted.

No case has been found and none is cited upholding the grant.

Under such circumstances, it appears to be reasonable that before so novel and, as it seems to me, dangerous a perversion of the public streets should be permitted, the defendants should establish their rights to construct, maintain and use this railroad solely for their private purposes in the action. The right should be settled before the road is built, not afterwards.

The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to continue the injunction *pendente lite* is granted, with ten dollars costs.

PATTERSON, P. J., and SCOTT, J., concurred; INGRAHAM and LAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

In the prevailing opinion the reversal of this order is made to depend upon a lack of power in the board of estimate and apportionment to grant the defendants Macy & Co. the privilege to construct this track. I do not agree with all that is said in the prevailing opinion, but I think this order should be affirmed on the ground that the plaintiffs are not in a position to enforce the rights of the public to restrain the defendants Macy & Co. from acting under

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the resolution of the board of estimate and apportionment. It is not alleged that the plaintiffs have any title to the fee of Thirty-fourth street, or that any property right of theirs is affected by the proposed use of the street. No structure is proposed to be erected in the street, and there is no actual obstruction placed upon either the street or sidewalk. What was authorized was a use of the surface of the street, and such a use was authorized by the municipal authorities having control of the streets of the city of New York. That plaintiffs have no property in the street, and that the Legislature would have power to authorize this use is settled since the decision of the Court of Appeals in *People v. Kerr* (27 N. Y. 188), reaffirmed in *Kellinger v. Forty-second Street, etc., R. R. Co.* (50 N. Y. 206), and has never since been seriously questioned. Assuming that the Legislature has not authorized the board of estimate and apportionment to grant such a right as this resolution grants to Macy & Co., the tracks would be a public nuisance, but an individual could not maintain an action to restrain its continuance unless he had suffered special damage in addition to that common to all the inhabitants of the State from the unauthorized use of the street.

The only possible injury that could accrue to plaintiffs would be the interference with the sidewalk and roadway of the street by the construction of these rails and subway below the surface of the street. Neither the proposed tracks nor subway, however, is in front of the plaintiffs' property, but is entirely in front of the property of Macy & Co. Access to the plaintiffs' property would not be at all interfered with, and it does not appear that the construction of such a track across the sidewalk would incommode any one using the sidewalk more than the construction of a pavement for carts and wagons. The plaintiffs, as the owners of property abutting on the street to the west of Macy & Co.'s property, would not, I think, suffer any more from this inconvenience than the rest of the public in walking along this street.

It seems to me that the case here presented is entirely different from that of *Callanan v. Gilman* (107 N. Y. 360). That case recognized the right of an abutting property owner to temporarily obstruct the streets for the removal of merchandise from his building, and cited with approval *Mathews v. Kelsey* (58 Me. 56), where

the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others." The facts of that case (*Callanan v. Gilman, supra*), which justified the plaintiffs in applying for an injunction, was that both the plaintiffs and the defendant were extensive retail and wholesale grocers, having stores next to each other on the south side of Vesey street in the city of New York; that a large portion of the plaintiffs' customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store; that goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk, and then a bridge made of two skids planked over so as to make a plankway three feet wide and fifteen feet long, with side pieces three and one-half inches high, was placed over the sidewalk, with one end resting upon the stoop of the defendant's store and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use over two hours, and remained in position across the sidewalk from four to five hours each business day, between the hours of nine o'clock A. M. and five P. M., and that it obstructed the sidewalk the greater part of every business day. It was held that the maintenance of this bridge was a nuisance, and that the facts proved special damage from the nuisance to the plaintiffs. There was proof that custom was turned away from the plaintiffs' store on account of the obstruction, and that pedestrians were turned to the north

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side of the street before reaching plaintiffs' store. That the plaintiffs suffered some special damage, not common to persons merely using the street for passage, is too obvious for reasonable dispute. In that case the court modified the injunction granted below by simply restraining the defendant from unreasonably obstructing the sidewalk by any plankway or bridge or other like obstruction elevated above the sidewalk and reaching from said premises or from the stoop in front of the same to the roadway of said Vesey street, or from unnecessarily or unreasonably hindering or preventing the plaintiffs or their employees, servants and customers from having the convenient use of and passage along the sidewalk of said Vesey street in front of said premises Nos. 35 and 37 Vesey street by any like obstruction.

The facts of that case and this are so different that it seems to me that it is not an authority for the plaintiffs, but, in the modification of the judgment, rather an authority for the defendants. There is here no evidence that there will be any obstruction to this sidewalk which will interfere with the access to the plaintiffs' premises. It does not even appear that the sidewalk will become more uneven or rough or inconvenient for use than the present paved entrance. The use of the proposed tracks was expressly limited to the night time, so that the actual obstruction to the street will be less than the constant use of the passageway for trucks or vehicles and every citizen of the State of New York using this sidewalk will be incommoded in the same way that the plaintiffs will be incommoded by the construction of these tracks and the subway underneath the street.

In *Fanning v. Osborne* (102 N. Y. 441) the unauthorized railroad track was laid immediately in front of the plaintiff's premises. The plaintiff was the owner of the bed of the highway, the public only owning an easement for highway uses in the land embraced in the street. Here the right to the injunction was because of the unauthorized use of the plaintiff's property, and not a mere right to abate a public nuisance from which the plaintiff sustained no special damage.

The city owning the fee of the street has authorized its use for a special purpose. Such use will cause these plaintiffs no other or greater damage than is caused the public generally in using the

street, and for that reason, according to the settled rule of law, the public, and not individuals, must abate the nuisance.

I think, therefore, the order appealed from should be affirmed.

LAUGHLIN, J., concurred.

Order reversed, with ten dollars costs and disbursements, and motion to continue injunction *pendente lite* granted, with ten dollars costs. Settle order on notice.

In the Matter of the Petition of ALBERT THIERIOT, as Executor, etc., of ROSA DELMONICO, Deceased, and LORENZO CRIST DELMONICO, for the Revocation as to JOSEPHINE CRIST DELMONICO of Letters Testamentary Issued to Her, as Executrix, and ALBERT THIERIOT, as Executor, etc., of ROSA DELMONICO, Deceased, and for the Removal of the Said JOSEPHINE CRIST DELMONICO, as Testamentary Trustee under Said Will, Respondents.

JOSEPHINE CRIST DELMONICO, Appellant.

First Department, February 25, 1907.

Partnership — executors and administrators — when surviving partner should not be removed as executor.

When the will of a deceased partner gives to a surviving partner, who is also made executrix and trustee, the controlling interest in the business and management thereof, free from any control or dictation from any person whomsoever, the surviving partner is the sole legal owner of the assets and has exclusive right of management in winding up the partnership affairs within the limits of good faith.

The other representatives of the deceased partner have no right to interfere with the surviving partner, or to require her removal as executrix and trustee, so long as she is applying the proceeds of the firm in settlement of its debts.

The representative of the deceased partner may require the application of the assets in payment of debts, but the mode and manner of so doing is under the exclusive control of the surviving partner.

A trustee appointed by will or deed will not be removed for violation of duty, or even breach of trust, if the fund is in no danger of being lost, and the court will only interfere when it is necessary to save the trust property. There must be such misconduct as to show want of capacity or fidelity, putting the trust in jeopardy.

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APPEAL by Josephine Crist Delmonico from a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 27th day of December, 1906, revoking as to herself letters testamentary theretofore issued to her and Albert Thieriot jointly, and removing her as testamentary trustee under the last will and testament of Rosa Delmonico, deceased.

Morgan J. O'Brien, for the appellant.

Solomon Hanford, for the respondents.

LAMBERT, J. :

In the year 1901 a copartnership known as "Delmonico's" existed for the purpose of carrying on a restaurant in the city of New York. This partnership consisted of Rosa Delmonico, owning four-sixths parts; Josephine C. Delmonico, with one-sixth, and Lorenzo C. Delmonico, the remaining one-sixth interest. The latter became the manager of the business. In 1903 it became known that Lorenzo C. Delmonico was heavily in debt, and that he had overdrawn his account with the firm to the extent of \$14,665.71. The copartnership was dissolved by mutual consent, Lorenzo C. Delmonico retiring, assigning his interest in the copartnership to Rosa and Josephine C. Delmonico in equal shares, and these two became copartners in the transaction of the business. At this time Rosa Delmonico owned four-fifths of the copartnership assets and Josephine C. Delmonico one-fifth, and this was the situation at the time of the death of Rosa Delmonico on the 24th day of March, 1904. By her will the said Rosa Delmonico gave one-fourth of her interest in the copartnership to Lorenzo C. Delmonico and three-fourths thereof to Josephine C. Delmonico, and the will provides that the latter is to have "the controlling interest in the said business in my place or stead, and as succeeding me in the same and in such control. It is my express wish and desire, and I hereby will and direct, that my niece, the said Josephine Crist Delmonico, shall have and exercise the controlling interest in the management, conduct and direction of said business, and that she shall control and dispose of the same as and when she shall see fit, absolutely, free from any control or dictation of any person or persons whomsoever."

Under the provisions of the will Josephine C. Delmonico and

Albert Thieriot were made executors, and both of them have qualified and entered upon the discharge of their duties. The decree now before this court on appeal revokes the letters testamentary issued to the appellant, Josephine C. Delmonico, and removes her as a testamentary trustee, because of certain alleged acts of misconduct on her part in dealing with the affairs of the copartnership known as "Delmonico's." It is alleged on the part of the petitioners, Albert Thieriot and Lorenzo C. Delmonico, that in December, 1904, it was decided by the executors that "Delmonico's" should be sold, and that for the purpose of reaching this result it was arranged that a firm of accountants, Barrow, Wade, Guthrie & Co., should be employed to make up a financial statement of the affairs of the copartnership. This firm was subsequently installed by the appellant, with the approval of the appellant and Thieriot, her coexecutor, as treasurer of the business. This relation continued for some time when the appellant, taking offense at some extra charges made by the treasurer and desiring to employ a less expensive firm, discharged the firm of Barrow, Wade, Guthrie & Co. This proceeding was then instituted for the removal of the appellant as executrix and testamentary trustee. So far the petitioners have succeeded, though the moving papers, which are not supported by any common-law evidence, do not charge incompetency, bad faith or any of the things which have been held necessary to justify the courts in displacing the executors and trustees named by a testator.

In the view which we take of this case, however, there is no occasion for determining whether the conduct alleged is such as to justify a removal of a testamentary trustee. It appears that at the time of the death of Rosa Delmonico the firm was largely indebted for current bills. Josephine C. Delmonico, as the sole surviving partner, became the legal owner of the assets of the copartnership and had the exclusive right to sell, mortgage and dispose of them in the performance of her duty in closing up the affairs of the partnership, and she had a right to do this in any manner, within the limits of good faith, that she might deem best for the interests of those concerned. The representatives of Rosa Delmonico have no legal interest in such assets and no legal right to interfere in their administration so long as the survivor is prosecuting the business of closing up the estate and applying its proceeds to the payment of the firm

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debts. The survivor does not take such assets as trustee, but as survivor, and holds the legal title subject to such equitable rights as the representatives have in the due application of the proceeds. They may, therefore, require the application of the assets to the payment of partnership debts, but the time, mode and manner of doing so are a part of the administration of the estate which is under the exclusive control of the survivors. While such representatives have an equal interest in the distribution of any surplus remaining after the payment of the debts, yet until all of such debts are paid, it is a mere contingency which may or may not eventually ripen into a legal right. (*Williams v. Whedon*, 109 N. Y. 333, 338.) While it has been suggested that the case above cited stated the law rather too broadly, there is no question that the only right of a personal representative is to call the surviving partner to account (*Secor v. Tradesmen's Nat. Bank*, 92 App. Div. 294, 298, and authority there cited), and as the appellant now before this court has claimed to act under her rights as a surviving partner, and neither she nor her coexecutor and trustee have had any occasion to deal with the assets of the copartnership of "Delmonico's," it cannot be said that she has been guilty of any misconduct as executrix or trustee under the will of Rosa Delmonico, even though she may have done all that is alleged in the petition. It appears from the record that the firm owed large debts; that these debts are being paid off out of the proceeds of the business, which has been conducted by the surviving partner for the purpose of placing it in a position where the property may be disposed of at an advantage; and until these debts are all paid and the affairs of the copartnership are adjusted, the executors and trustees under the will of Rosa Delmonico have no relation to the affairs of the copartnership, except to see that the surviving partner liquidates the affairs of the firm within a reasonable time. (*Secor v. Tradesmen's Nat. Bank*, *supra*.)

We are of opinion that, under the rule recognized in *Matter of Scott* (49 App. Div. 130), all of the questions presented by the record are open to review here, and that upon the record as shown by the pleadings, the petitioners are not entitled to the relief demanded for the reasons above suggested. Moreover, upon the facts placed before us, we are unable to discover sufficient grounds

for removal, even if the subject-matter were within the purview of the executors and trustees. The rule is sanctioned by authority that a trustee will not be removed for every violation of duty, or even breach of the trust, if the fund is in no danger of being lost. The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the court. There must be a clear necessity for interference to save trust property. Mere error or breach of trust may not be sufficient. There must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy. (*Elias v. Schweyer*, 13 App. Div. 336, 340; *Matter of Waterman*, 112 id. 313, 318.)

The decree appealed from should be reversed, with costs, and the proceeding dismissed, with costs.

INGRAHAM and LAUGHLIN, JJ., concurred; PATTERSON, P. J., and HOUGHTON, J., concurred in result.

Order reversed, with costs, and proceeding dismissed, with costs. Order filed.

JAMES D. SMITH, Individually and as Executor, etc., of DAVID STEVENSON, Deceased, Respondent, v. DAVID STEVENSON BREWING COMPANY and Others, Appellants, Impleaded with MARION BUCKLER and Others, Defendants.

First Department, February 15, 1907.

Executors and administrators — party — when trustee who has participated in illegal transfer of property may bring action to rescind the same.

The plaintiff, individually and as executor, brought action against his coexecutors to set aside a conveyance of property of the estate. It was alleged that one of the defendant executors fraudulently induced the plaintiff and other executors to convey to an irresponsible party a brewery which was part of the estate; that said party paid no cash consideration, but gave a purchase-money mortgage on certain parts of the property, and immediately thereafter conveyed the brewery, without consideration, to a corporation, in order that the defendant executor might acquire ownership thereof by controlling the stock of the corporation, which was issued to him and other defendants and to the plaintiff, without consideration.

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Held, that facts were alleged that showed that the executor had obtained the trust estate for his own use, was guilty of a breach of trust, and that a cause of action for equitable relief was stated;

That the objection that the complaint did not state a cause of action in favor of the plaintiff was not tenable because having discovered the illegality of the transaction, he was entitled that the conveyances be declared null and void or in the alternative that all the stock of the corporation issued should be declared to be the property of the executors in their trust capacity;

That, although the plaintiff had himself received part of the stock, as he disaffirmed the transaction, he need not join himself as a party defendant;

That the plaintiff, being trustee of an express trust, might sue as such, even though he participated in the acts complained of, which rule obtains whether the participation were innocent or not, especially as certain of the beneficiaries had requested that he bring action;

That the doctrine of *in pari delicto* does not apply to trustees suing in their representative capacity, it being their duty, if party to an illegal transfer of trust property, to repent and sue for the restitution of the fund.

(Per INGRAHAM, J.): Where a trustee has been guilty of a breach of trust, a request of the *cestui que trust* that he bring action is not necessary, nor can defaulting cotrustees object that the beneficiaries have not formally elected whether they will affirm or disaffirm the transfer.

APPEAL by the defendants, David Stevenson Brewing Company and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of May, 1906, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the said defendants' separate demurrers to the amended complaint.

Gratz Nathan of counsel [*Thomas J. Farrell*], for the appellants David Stevenson Brewing Company and others.

George H. Taylor, Jr., of counsel [*Appell & Taylor*], for the appellants Brenner and others.

George F. Martens, for the appellants Evans and Martens.

Anson M. Bearl, James M. Gifford with him on the brief, of counsel [*Gifford, Hobbs, Haskell & Beard*], for the respondent.

CLARKE, J. :

The plaintiff, suing individually and as an executor and trustee under the last will and testament of David Stevenson, deceased,

brings this action against the David Stevenson Brewing Company, James McClenahan, individually and as an executor and trustee under the last will and testament of David Stevenson, deceased, and joins as defendants all the heirs and next of kin, legatees and devisees of David Stevenson, deceased, the executor of the widow of said Stevenson and all the stockholders of the David Stevenson Brewing Company.

The action is in equity to set aside a conveyance by the coexecutors and trustees under the will of David Stevenson, deceased, to the defendant corporation, or in the alternative, to decree that all of the stock of the said corporation is the property of said executors and trustees, and also to adjudge whether certain shares of said stock now held by the plaintiff individually are the individual property of the plaintiff or are rightfully the property of said executors and trustees. The complaint states that fifteen months after the death of the testator the defendant McClenahan fraudulently induced the plaintiff and the third coexecutor, now deceased, to convey to an irresponsible party, the defendant Robertson, a brewery which composed part of the testator's estate. The said Robertson paid no cash consideration for the property, but gave a purchase-money mortgage on certain parts of the brewery property and immediately thereafter conveyed said brewery, without consideration, to the defendant corporation, in order that said McClenahan might acquire the ownership thereof through the ownership of the stock of said corporation, and pay the estate and heirs by said mortgage, which was not assumed by the corporation, and pay said mortgage by the income from their own property; that said corporation issued all of the capital stock without consideration to McClenahan and certain other defendants; that McClenahan controlled a majority of said stock and is president and treasurer of said company, and that until a recent date the plaintiff was ignorant of these fraudulent acts of the defendant McClenahan.

Demurrers are interposed by various defendants upon the ground that the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff, either individually or as an executor or as a trustee, and that the plaintiff has no right to sue individually. The demurrers having been overruled, this appeal is taken.

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In brief the cause of action alleged in the complaint is the wrongful purchase of the trust property by an executor and trustee. The demurrer admitting all the facts alleged in the complaint, it is too clear to require argument that the conduct by which the managing executor and trustee obtained the trust estate for his own use and benefit was a breach of trust, and that a cause of action is set up calling for the appropriate remedy of a court of equity. I do not understand that the appellants seriously contend that the facts alleged are insufficient to constitute a cause of action and require answer, if the proper parties had brought the action.

The objections urged are, first, that the complaint does not set forth a cause of action in favor of the plaintiff individually or in his own right against the demurring defendants. I think there is no substance in this claim. The method employed by the defendant McClenahan, as alleged in the complaint, to procure the trust estate for himself was the formation of a corporation which he controlled. The complaint alleges that the said McClenahan caused fifty shares of stock of said corporation to be transferred to the plaintiff, individually, without a consideration, and that none of the shares of said corporation were issued in the first instance or have ever been transferred for value or are in the hands of *bona fide* holders. The relief demanded is in the alternative that all the deeds and conveyances and transfers be declared null and void, or that all the stock of the corporation be declared to be the property of the executors and trustees and transferred to them as such. If this latter relief were the one granted by the court, it would be as effectual a return of the property as if what had been done should be specifically undone, because the owners of all the stock would be the owners of all the property. In order to permit this remedy to be administered, all of the stockholders have been made parties defendant. It would seem to be an idle ceremony for the plaintiff to join himself as a party defendant as a stockholder. He disaffirms the transfer of the shares to himself and brings them into court and asks that the court pass upon his apparent rights as a stockholder, at the same time that it passes on the rights of all the other parties defendant. As an individual he asks no individual relief as against anybody. This objection, therefore, is not well taken.

Secondly, the appellants contend that the complaint does not set

forth a cause of action in behalf of plaintiff, as executor and trustee under the last will of David Stevenson, against the demurring defendants, or any of them. They say that while it is true that a trustee may not purchase or deal in the trust property in his own behalf, or have an interest in any such purchase, that rule does not render such a purchase void, but voidable only, and that only at the instance of the beneficiaries or of the party who has acquired the right of the beneficiaries; that the title may be affirmed by the beneficiaries as well by acquiescence and lapse of time as by the express act of the beneficiaries, and unless the beneficiaries elect to disaffirm, the transaction becomes valid and effectual.

The answer to this contention seems clear. The plaintiff is the trustee of an express trust, and as such has the right to sue. He participated in the acts complained of, innocently he says, and having recently discovered the truth, disaffirms those acts, and asks the aid of the court in enabling him to undo what he has wrongfully and improperly, although unknowingly, consented to and aided in doing.

Certain of the *cestuis que trustent* have demanded, not only that he bring this action, but that his cotrustees join with him in bringing this action for the benefit of such *cestuis que trustent*, and no one of said beneficiaries, whom demurrants complain should be the parties to elect to disaffirm and bring this suit, join in the demurrer to this complaint.

I am of the opinion that, as the title to the trust fund is in the trustee, that he alone can bring the action, unless he has actively participated in or silently connived at the breach of duty, or unless the *cestui que trust* has made a demand upon him to bring the action and the trustee has refused to comply therewith. The doctrine of *in pari delicto* does not apply to trustees suing in their representative capacity. It is their clear duty, if they have been at any time party to the illegal transfer of the trust property, to repent and commence an action for the restitution of the fund. Even if the plaintiff had been a knowing, instead of an innocent, participator in the alleged acts of McClenahan, still he would have had the right to disaffirm said acts and begin the action, being an action not for his own benefit but that of his wronged *cestuis*.

In *Weetjen v. Vibbard* (5 Hun, 265) the court sustained the

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demurrer to a complaint in an action brought by the *cestuis que trust*. In that case there were three trustees, two of them were concerned in the fraudulent transaction complained of, and one of them was not. Instead of making a demand upon the trustee not implicated, and who did not refuse to bring the action, one of the *cestuis que trustent* brought an action in his individual name. In sustaining the demurrer the court said: "They (referring to the *cestuis*) are permitted to maintain the action only when that may be the necessary way of protecting their interests, and no such necessity can exist when the conduct of one of the trustees is free from objection and he has not declined to prosecute in their behalf."

It was said in *Western R. R. Co. v. Nolan* (48 N. Y. 513): "The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attack or injury tending to impair its safety or amount. The title to the fund being in them, neither the *cestuis que trust* nor the beneficiaries can maintain an action in relation to it, as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant."

The same rule was laid down in *Robinson v. Adams* (81 App. Div. 20). In *Wood v. Brown* (34 N. Y. 337) it was held that one of two executors may maintain an action in equity to call his coexecutor to account, and that the creditors, legatees and next of kin are not necessary parties, except in case of a final accounting.

In *Wetmore v. Porter* (92 N. Y. 76) it was said: "We see no reason why a trustee who has been guilty even of an intentional fault is not entitled to his *locus penitentie* and an opportunity to repair the wrong which he may have committed." "It is an alarming proposition to urge against the legal title which a trustee has to trust funds that his recovery of their possession may be defeated by a wrongdoer upon the allegation that the lawful guardian of the funds colluded with him in obtaining their possession."

Zimmerman v. Kinkle (108 N. Y. 282) and *First National Bank v. National Broadway Bank* (156 id. 459) are also authorities maintaining the right of action in the plaintiff as executor and trustee, as in this case.

It appearing, therefore, that the facts set forth sufficiently state a

cause of action, and that there has been no improper joinder of parties, the interlocutory judgment overruling the demurrers should be affirmed, with costs to the plaintiff, respondent, with leave, however, to the appellants within twenty days, and upon the payment of costs in this court and in the court below, to withdraw said demurrers and to answer over.

PATTERSON, P. J., LAUGHLIN and SCOTT, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the affirmance of this judgment. It is not necessary to decide whether or not the beneficiaries of this trust could maintain the action without a request of the trustees, who had been guilty of dealing with the trust property for their own benefit, to sue, and a refusal by them. I do not understand that any of the cases cited is an authority for the proposition that where a trustee has been guilty of the breach of trust charged, a request is necessary for the *cestui quo trust* to maintain an action either against a trustee to recover for the breach of trust, or against parties to whom he has transferred the trust property in violation of the trust and with notice of the trust relation.

In this case the plaintiff admits that he received a benefit from the transactions complained of. He alleges that he received this benefit without full knowledge of the transactions, and that certain beneficiaries having requested him to sue he has complied with their request. He presents the facts to the court and asks it to render such judgment for the protection of the beneficiaries as is just. I think he had a right to maintain this action asking for alternative relief, and the court having all the parties before it can grant such relief as the situation as presented at the trial requires.

It also seems to me clear that before a court can grant a judgment setting aside the transaction and requiring the corporation to retransfer the property of the testator to the trustees, the stock issued by the company in payment of the property would have to be returned; but as the plaintiff has but a small proportion of stock which he offered to return, the balance of the stock being held by or for the other trustees, it is quite clear that it would be impossible for the plaintiff to offer to return the stock that is held by his cotrustees.

I also think that this transaction was not void but voidable at the election of the beneficiaries. If the property had been transferred to the corporation and the corporation had issued all of its capital stock to the trustees who held the stock as part of the trust estate, it is difficult to see how there would have been any misapplication of the trust funds. The estate would then have held a mortgage upon the property and all the stock of the corporation, owning the equity of redemption, and thus would have held substantially what was held before, *i. e.*, all the property. The fraud consisted of the trustees taking the stock issued by the company for the purchase of property to themselves individually instead of to themselves as trustees. Undoubtedly those interested in the estate could ratify this transaction, but require the trustees to account for all that they received as a consideration for the transfer of the property, for I assume that if the rights of innocent third parties are not affected they could elect to set aside the whole transaction and have the property thus disposed of retransferred to the trustees to become part of the trust estate. But as the plaintiff, one of the trustees who joined in the transaction complained of, could not elect for the beneficiaries, I think he had a right to come into court, present the facts making the beneficiaries a party, and ask the court to make such a decree as would be required to protect the trust estate. Neither the defaulting trustees nor the corporation who received the property with notice of the trust can object to the maintenance of the action upon the ground that the beneficiaries have not yet formally elected as to whether they will affirm or disaffirm the sale to the corporation. The plaintiff individually as a stockholder was a proper party to the action, and whether he should have been made a party plaintiff or party defendant does not seem to be material.

I think, therefore, a good cause of action is alleged, and for the reasons here stated I concur in the affirmance of the judgment.

Judgment affirmed, with costs, with leave to answer over on payment of costs.

GAMALIEL C. ST. JOHN, as Executor of and Trustee under the Last Will and Testament of WALLACE C. ANDREWS, Deceased, Respondent, v. THE ANDREWS INSTITUTE FOR GIRLS and Others, Respondents, Impleaded with SMITHSONIAN INSTITUTION and Others, Appellants.

First Department, February 8, 1907.

Will — evidence — rules as to proof of survivorship when several parties perish in same disaster — when gift to charitable institution not in violation of chapter 360 of the Laws of 1860 — gift to corporation not in esse — when existence of foreign corporation cannot be questioned here — equitable conversion — when corporation entitled to increase of funds.

At common law there is no presumption of survivorship between persons who perish in a common disaster based upon a difference of sex, age or physical condition and strength, nor is there a presumption the death of all occurred at the same instant. Yet through necessity in the administration of the law the title to real and personal property passes as if they had all perished at the same instant of time in the absence of proof of facts or circumstances tending to show survivorship among them.

Therefore, when it appears that a testator, his wife and a legatee all perished in a fire which consumed a dwelling house, the burden is upon the administrator of the legatee in order to entitle him to receive the legacy to prove facts and circumstances tending to show that she survived the testator. But under such circumstances, there being no presumption of death at the same time, there is no burden upon the administrator to overcome any presumption, but merely to prove the fact of survivorship as any other fact is required to be proved. Neither is it necessary to show that the deceased survived the testator for any length of time; survival for a second is sufficient.

In order to establish the survivorship aforesaid it was, among other things, shown that the testator was last seen in an upper story of the building warning the occupants to fly, which portion of the building suffered greatly from the fire and where his body was afterwards found. The legatee, however, was removed still breathing from a part of the building where the destruction by fire was not great, and where life was sustainable for a longer period. She survived her removal from the building a few minutes. On all the evidence,

Held, that a finding that the legatee survived the testator was warranted by the evidence.

The testator, after specific bequests, bequeathed and devised the residue of his estate to an executor in trust to collect the rents and income and pay the same over to his wife for life. Upon her death he devised a certain sum to persons named, and the excess of the residue over the sum stated to a charitable corpo-

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ration directed to be formed by his executor. The will further provided that should the wife predecease the testator, the bequest to the corporation should take effect at his death. There being no proof whatever as to whether the testator or his wife had perished first, it was contended that the gift to the charitable corporation was void under chapter 860 of the Laws of 1860, providing that no person having a husband, wife, child or parent, etc., shall give by will to any charitable, etc., corporation more than one-half of his or her estate, after the payment of debts and that the gift shall be valid to the extent of one-half only, on the theory that such gift is invalid if the testator have a wife living at the time of making the will.

Held, not so; that the validity of such gift depends upon the survivorship of one of the persons enumerated in the act, as a will does not take effect at the time of execution but only at the death of the testator;

That a bequest or devise in violation of said statute may be attacked by other than those enumerated in the act, and heirs or next of kin have a standing to be heard on the question;

That the word "having" a husband, wife, child or parent should be construed to mean "leaving" such persons surviving;

That as the will provided for the formation of the corporation after the death of the testator's wife and that the bequests to it should take effect at his death if she predeceased him, the will should be construed to mean that the bequest was to vest in the corporation if *in esse* at the death of the wife, but if not then *in esse* to vest when it was formed by the trustee, and hence the gift did not fail as being a gift *in presenti* to a corporation not in existence at the testator's death;

That the law favors charitable bequests whether to be administered at home or abroad, and the right of a foreign beneficiary to take will be determined by our courts before directing the executors to turn over the fund. But the right of a foreign corporation to take must be determined by the law of the foreign jurisdiction unaffected by our law relating to accumulations and perpetuities.

Regardless of the question as to whether chapter 701 of the Laws of 1898 empowers a charitable corporation to take, as a suspension of the power of alienation is permissible during a period necessary to form a corporation to take a gift, not exceeding two lives in being at the death of the testator, the gift was valid as an executory devise or bequest.

When such foreign charitable corporation has been formed under the laws of Ohio and under an act passed after the death of the testator, though not referring expressly to the corporation, it is a *de facto* corporation acting under color of law, and its right to the gift cannot be attacked on the theory that the act was in violation of section 1 of article 13 of the Constitution of Ohio, which prohibits special acts conferring corporate powers. Especially is this so when its corporate existence may be sustained under other statutes of Ohio.

Under the authority to determine whether such foreign corporation is competent to take, the court may determine the extent of its corporate authority, but not its right to corporate existence.

When an executor is directed to incorporate an educational institution and to turn over to it the residue of the estate in cash, there is an equitable conversion of the realty into personalty as of the date of the death of the testator. As gifts in trust for charitable uses are deemed absolute gifts so far as the testator is concerned in order to enable the beneficiary to take, the rents and profits of the real property directed to be converted as aforesaid during the period intervening between the death of the testator and the formation of the corporation are to be paid over to the beneficiary and are not unlawful accumulations under section 51 of the Real Property Law and section 4 of the Personal Property Law.

Moreover, even if such corporation be not entitled to take said rents and profits under the will, it is entitled thereto under section 58 of the Real Property Law and section 2 of the Personal Property Law, when it is the party entitled to the next eventual estate.

Such corporation under the will aforesaid is the party entitled to the next eventual estate, although not incorporated at the time of the death of the testator.

SEPARATE APPEALS by the defendants the Smithsonian Institution and another and by the defendants Norman C. Andrews and others from different portions of a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 25th day of January, 1906, upon the decision of the court rendered after a trial at the New York Special Term.

Harold Nathan, for the appellants Norman C. Andrews and others.

Ferdinand Shack, for the appellant Julia A. Bruce.

Frank W. Hackett and *Edmund Wetmore*, for the appellant Smithsonian Institution.

James W. Hawes and *William N. Cohen*, for the plaintiff respondent.

Henry Wollman and *Virgil P. Kline*, for the respondent Andrews Institute for Girls.

Herbert H. Gibbs, for the respondents G. C. St. John, individually and as executor of Margaret M. St. John Andrews, deceased, and as administrator with the will annexed of Georgie Boyden St. John, deceased.

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LAUGHLIN, J. :

This is an action by the executor of and trustee under the last will and testament of Wallace C. Andrews, deceased, for a construction of the will of his testator. The will was executed on the 12th day of November, 1891, and the testator died in the city of New York on the 7th day of April, 1899, leaving real property in the States of New York, New Jersey and Virginia, and certain personal property. At the time he executed the will he had a wife living, and he designated her as an executrix of his will, but she perished with him in the destruction of her house, No. 2 East Sixty-seventh street, New York, where they resided, by fire, and the trial court was unable to decide on the evidence whether she predeceased or survived him. The will was duly admitted to probate, as one competent to pass both real and personal property, by the surrogate of the county of New York on the 22d day of May, 1899. Letters testamentary were issued to the plaintiff as sole surviving executor on the 23d day of May, 1899, and he qualified and has ever since acted as executor and trustee under the will. The legatees, heirs, next of kin and the Attorney-General—the latter in accordance with the requirements of chapter 701 of the Laws of 1893—were made parties defendant.

The testator left no child, grandchild or parent him surviving. In the 1st clause of the will he provided for the payment of his debts, funeral expenses and the cost of administration and certain specific legacies, depending on the value of his estate, to two sisters; and in the 2d clause devised the rest, residue and remainder of his estate *to his executors in trust*, to collect the rents and income and pay the same over to his wife for life. Upon her death he by the 3d clause devised \$500,000, if the estate should exceed that sum, and if not, all the residue, one-fourth to each of two sisters, an eighth to another sister, an eighth to a niece, an eighth to Gamaliel C. St. John, brother to his wife, whom he appointed his executor, and an eighth to the wife of St. John; and by the 4th clause, "*upon the death*" of his wife, he devised and bequeathed "to the corporation hereinafter directed to be formed all the excess and residue" of his estate over the sum of \$500,000 thereinbefore devised, as already stated. He then in the 5th clause provided for the formation of a corporation under the laws of Ohio by his executors to take the bequest;

and in the succeeding clause of the will provided that in the event that his wife should predecease him, the bequest to the Ohio corporation to be created "shall take effect upon my death." The executor, in fulfillment of the directions of the testator contained in the will, procured the incorporation of the Andrews Institute for Girls under the laws of Ohio on the 13th day of May, 1902, and the corporation organized and accepted the gift on the twenty-ninth of the same month. The legacies to Mr. and Mrs. St. John have not been paid. The residuary estate has not been distributed. Its value is about \$1,300,000, and it is more than one-half of his entire estate. The testator further provided in the will that should the bequest to the corporation to be formed under the laws of Ohio "because of illegality fail or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution, * * * to be devoted to the purposes for which it was established." Georgie Boyden St. John, the wife of Gamaliel C. St. John, was also in the fire, and, although rescued alive, died soon after in consequence thereof.

The appellants, who are heirs and next of kin, or represent heirs or next of kin of the testator, contend, in the first place, that Mrs. St. John did not survive the testator; that, therefore, the legacy to her never vested, and, consequently, her husband, as administrator, is not entitled thereto, and, further, that as to this part of his estate, the testator died intestate. The trial court decided that she survived the testator, and that the legacy which vested in her goes to her administrator. The first question to be decided, therefore, is this important question of fact as to whether she survived the testator. Most of the evidence in the record was read from another record of evidence taken before a referee in the year 1902—nearly three years before this trial—on a hearing on an application of one of the next of kin to be made a party to the accounting in the Surrogate's Court, which was before this court on a former appeal. (*Matter of St. John*, 104 App. Div. 460.) We then refrained from expressing any opinion on the merits of the questions now presented.

The undisputed evidence shows that the testator and his wife perished in the destruction of the house by fire in the early morning of the 7th day of April, 1899, and that Mrs. St. John died

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within a few minutes after being rescued from the fire in an unconscious condition and without having regained consciousness. Proof of these facts, in the absence of evidence that Mrs. St. John survived the testator, was sufficient to establish that the legacy never vested in her, and that, unless otherwise devised or bequeathed under the will, it went to the next of kin of the testator. (*Newell v. Nichols*, 12 Hun, 604; *affd.*, 75 N. Y. 78.) Under the civil law there was a presumption of survivorship between those who perished in a common disaster, based upon sex and age, and in some jurisdictions there is such a presumption based upon physical condition and strength, but in England and in this and other States of the Union, where the common law prevails, no such presumption exists, nor is there a presumption that in such case death occurred to all at the same instant, and yet through necessity in the administration of the law the title to real property passes and personal property is distributed as if they all perished at the same instant of time *in the absence of proof of facts or circumstances tending to show survivorship among them.* (*Wing v. Angrave*, 8 H. L. Cas. 183; *Underwood v. Wing*, 4 De G., M. & G. 633; *Newell v. Nichols*, *supra*; *Young Women's Christian Home v. French*, 187 U. S. 401; *Coye v. Leach*, 8 Metc. [Mass.] 371; *Johnson v. Merithew*, 80 Maine, 111; *Will of Abram Ehle*, *Estate of James A. Ehle*, 73 Wis. 445.) When, therefore, evidence was adduced showing that they all met death in the same conflagration, it was incumbent upon the administrator of Mrs. St. John, in order to entitle him to receive the legacy given to her under the will, to prove facts and circumstances tending to show that she survived the testator, and the burden of proof of establishing this fact, upon which his right to the legacy depended, was upon him. (*Newell v. Nichols*, *supra*.) It is to be borne in mind, however, in considering the evidence offered for this purpose that the fact that they died as a result of a common conflagration raised *no presumption of death at the same time*, which the evidence offered in behalf of the administrator of Mrs. St. John must overcome. Proof of death in the common disaster left the case *without any proof or presumption on the subject of survivorship*, and the burden was on the administrator of Mrs. St. John not to overcome any presumption, but to prove the fact of survivorship the same as any other fact is required to be proved in

the administration of the law. (*Newell v. Nichols, supra*; *Will of Abram Ehle, Estate of James A. Ehle, supra*.) In the Wisconsin case cited, where neither party was rescued from a fire or seen alive during the fire, a finding of survivorship was sustained based upon circumstantial evidence as to the course and violence of the conflagration. The learned trial justice in the case at bar found that the evidence established the fact that Mrs. St. John survived the testator. In the decision of the court many facts are found relating to this question with greater detail and minuteness than was essential and perhaps than was justified by the evidence. We need not determine whether they are all sustained by the evidence. It was not necessary to show that she survived the testator any given length of time. It is sufficient if the evidence fairly warrants the inference *that she survived the testator*, even though the period of survivorship may have been less than a second.

The residence of the testator, in which the fire occurred, was the first house on the southerly side of Sixty-seventh street east of Fifth avenue. It was about twenty-seven feet in width and eighty feet in depth, with a rear extension, in addition, which extended up to the level of the third floor. The main building contained four stories and an attic above the basement. The principal entrance was at the front and east. The vestibule opened into a hall nine feet in width, which led to the main stairway situated at the easterly side about midway between the front and rear of the building. The library was directly west of this stairway and separated from it by a hall into which it opened at the foot of the stairway, and it also opened into the dining-room in the rear. The front room referred to by the witnesses and used as the parlor — on the diagram it is the library — opened into the library and into the hall between the vestibule and stairway. The main stairway only led to the third floor. Directly above the main stairway was a rectangular open space nineteen feet in length north and south and nine feet in width, extending to the roof, where it was covered by a large skylight. On the fourth floor the open space above the main stairway was inclosed by the wall of the building on the east and by semi-fireproof partitions of scantling, lath and mortar six inches in thickness, extending to the attic, with a window in the south and north end, each three and one-half feet wide and five and one-half feet high, to light the fourth floor

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from the skylight. The lower part of the house was originally of fireproof or semi-fireproof construction; but throughout the house to a considerable extent linernsta walton, a highly combustible material, had been used in decorating and particularly on the partitions on the fourth floor, and the furnishings of the house were highly inflammable. The testator was sixty-five years of age, his wife fifty-three, and Mrs. St. John thirty-eight, all in fairly good health. Some time before the fire occurred, all of the occupants of the house had retired for the night. The testator slept in the middle room on the second floor, over the library. His wife slept in the rear room on the same floor. Mrs. St. John and her six-year-old son Wallace slept in the rear room on the third floor, and two other children of Mrs. St. John and two nurses occupied the middle and front rooms on that floor. Six female servants occupied separate rooms on the fourth floor. Of the fourteen occupants of the house on that fatal night, only two survived. Jennie Beirne, the laundress, who occupied a room toward the southwesterly and rear part of the house on the fourth floor, overlooking an extension connecting the house with the third house on Fifth avenue southerly from Sixty-seventh street, which was owned by the testator, escaped by jumping from the window upon the extension, from which she was taken into the Fifth avenue house; and Alice White, now Sheak, the cook, who occupied a room in the southeasterly corner of the house overlooking an extension of the next house to the east, owned by one Rothschild, escaped by leaping from the window of her room upon this extension. The origin of the fire is not satisfactorily shown. Flames were first observed in the parlor and coming out the parlor windows and the transom over the front door. The flames quickly shot up the stairway and broke through the skylight, and on the third and fourth floors, particularly, they spread out from the well hole above the stairway. There was also a servants' stairway which ran from the basement, or first floor, as to which the evidence is conflicting, just south of the main stairway, and separated from it by a partition of plaster blocks supposed to have some fire resistance, to the fourth floor. On the fourth floor a hallway extended around the head of the servants' stairway and the partitioned off well hole above the main stairway, connecting with a bathroom and with the servants'

rooms on that floor. From the fourth floor, at a point near the entrance to the room occupied by Jennie Beirne, and diagonally southwesterly across the hall about twelve feet from the head of the servants' stairway, a stairway extended to the attic; and from a point not definitely shown, but probably near the head of the stairway in the attic, an iron ladder led to a scuttle hole in the roof, which was found bolted after the fire, indicating that it had not been used. Between the third and fourth floors, the flames spread out and practically consumed the servants' stairway and the partitions above around the well hole over the main stairway. The testimony of the maids who survived tends to show that the testator came up to the fourth floor, which could only be reached by the servants' stairway from the second or third floor, and from a point in the hall on the fourth floor toward the front from Jennie Beirne's room, alarmed the servants by calling out to them, "Come on, girls, the house is on fire." This was the last heard from him and the last place he is known to have been alive, and there is evidence tending to show that his charred remains were found in that hallway near the head of the servants' stairway. Jennie Beirne testified that she had been asleep and was awakened, but did not know by what, and then heard a noise and "got up right away;" that she noticed no smoke or anything in her room, thinks she had not closed her door tightly but had left it partly open; that on rising she opened the door to see what was the matter and heard the voice of a man say, "Come on, girls, the house is on fire;" that the voice seemed to be in the hall toward the front from her; that it was dark and she could not see anything, and she heard some of the girls call out, "Where is Alice? Call Alice," and that the voices of the girls seemed also to come from the hall very near where she stood; that she saw no flames in the hall, but saw the reflection of flames seemingly toward the rear of the house, but she was not certain; that she stopped at her doorway about one minute without going into the hall, and then went back and threw open her window and, after standing a moment to think what to do, jumped onto the extension of the Fifth avenue house and lost consciousness; that she saw no smoke in the hall and experienced no signs of suffocation and no difficulty in breathing, but says that the reason she did not go into the hall and downstairs was that she "believed the house was all

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on fire downstairs;" that she supposed the voice she first heard was that of the testator, but could not say positively. Alice White (now Sheak) testified that she left the door of her room wide open on retiring, and was awakened by hearing Eva Patterson, one of the maids, calling, "Alice, Alice, fire, fire," and the voices seemed to come from her bedroom door; that she heard no other voice or person in the house after that; that she got out of bed, and the room was full of smoke and she felt kind of suffocated and put something in her mouth to prevent suffocation and then tried to escape by the door, but "it was either full of smoke or flames or reflections of flames," she did not know which; that she could get no further than her door, "because it was all full of smoke and flames," and so she went straight back to her window, threw it up and jumped upon the extension of the Rothschild house; that she thinks it was five minutes after she was called before she jumped, and that she lay on the extension two or three minutes perfectly conscious, until the smoke which was on her blew off, and then climbed into a window in the Rothschild house and met some people, one of whom was a policeman coming up, and was assisted to a house across the street; that about five minutes after she arrived there, Mrs. St. John's second boy, Wallace, was brought over, and in two or three minutes after that she was taken away by the surgeon of the Presbyterian Hospital in an ambulance; and with respect to her condition she testified, "I was burned all up my right arm and my ears and nose and hair was slightly burnt; my right arm was burnt all the way up and the left one a little. My nightdress was scorched, the sleeve was burnt but the other side, the right side, was scorched;" that she heard no other noise and felt kind of suffocated when she got out of bed, and thinks her arm was burned while standing at the window, but whether by flames from within or without she could not say, but the only place she saw flames was in the hall. The evidence shows that the entrance to Jennie Beirne's room was about twelve feet southwesterly from the head of the servants' stairway, and that of Alice White was twenty-two feet southerly from the head of said stairway. It is undisputed that the charred remains of the testator were found on the fourth floor, but there is some conflict in the evidence as to the precise spot. McManus, one of the firemen who found the body, testified on the former proceeding that it was found in the hallway

"right near the stairway" leading down to the third floor, and the court has so found. This fireman, when called to the stand on this trial and shown a diagram, indicated thereon that the body was found in the hallway opposite the opening over the main stairway, and his testimony indicates that he supposed that the main stairway led to the fourth floor. Although the servants' stairway between the third and fourth floors was substantially burned away, sufficient remained to indicate where it had been, and part of it was standing and was observed by one at least of the firemen who testified that the body was found near the head of the stairway. Moreover, Acting Chief Farrell describes the place where the body was found as in the hall on the fourth floor, "at the landing on the fourth floor," and says, "There was a stairway leading from that fourth floor into the attic, close to where the body was found." There was no confusion about the location of the stairway leading to the attic from the fourth floor, and, therefore, his testimony fixes the point in accordance with the finding of the court. Fireman Jacobs also locates the point where the remains of the testator were found in accordance with the finding of the court. The evidence fairly warrants the inference drawn by the trial judge that the body was found at the head of the servants' stairway, and that he was overcome there. It is argued from this fact that, after warning the girls, the testator attempted to retrace his steps but was overcome by the smoke, heat or flames, and must have quickly perished. The only other evidence with respect to the place where the body was found indicates that it was found some feet to the north of the head of the servants' stairway, in or opposite an aisle leading to the bathroom from the hall opposite the opening over the main stairway, which it is claimed precludes any inference being drawn that he endeavored to return downstairs or as to when he was overcome. The remains of the servants who were sleeping on the fourth floor and did not escape were found in the attic at the head of the stairway leading from the fourth floor to the attic. It is argued from this that since the girls, after having been aroused by the testator, had time to get to the attic, he also had and either was overcome there and his remains dropped to the fourth floor from the stairs or through the stairwell at the time or after the fire, or, being unable to

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get out the scuttle hole, he started to retrace his steps and became bewildered at the fourth floor and wandered about there seeking the descending stairway. Significance is sought to be attached to the language in which the testator aroused the servants, and it is urged that it indicates that he was on his way to the scuttle hole in the roof and called to the maids to follow. Notwithstanding the language ascribed to him, it is more reasonable and probable to infer that he meant merely to call the servants out of their rooms to enable them to escape or to aid in rescuing the other occupants of the house, among whom were young children, or in saving property should there be time. It is not a reasonable inference that he would be more interested in rescuing the servants than his wife and sister-in-law and her helpless children, who, so far as the evidence shows, he had not even aroused at the time he alarmed the servants, and it is highly probable that he intended to return downstairs. But be that as it may, the conclusion is fairly warranted by the evidence that life could not have been long sustained in the hallway on the fourth floor or stairway leading up or down therefrom after the testator was last heard on that floor, for the evidence indicates that the flames soon broke through the skylight and raged with great fury above the main stairway and adjacent thereto on the fourth floor and along the line of the servants' stairway and the attic stairway. The skylight and plaster and part of the floor and ceiling and the material from the attic and from the roof fell on the main stairway and fourth floor to the depth of about four feet, covering the body of the testator, which was burned to a crisp. On the lower floors and on the third floor, where Mrs. St. John was, the destruction by the fire was not so great and there was very little damage in the front and rear, while above that floor the fire spread out and was much more destructive. The inference is fairly warranted that life was sustainable in the rooms on the third floor, where Mrs. St. John and her children and the two maids were, until she opened the door leading to the main stairway, after they had evidently all arisen and prepared to leave that way.

It is not material whether the findings as made, that the testator perished immediately after he was heard on the fourth floor and before Mrs. St. John was found, and that Mrs. St. John lived several minutes after she was found, are fully sustained by the evi-

dence. The question is, does the evidence fairly warrant the finding that she survived him? The evidence tends to show that ten minutes or more after the testator was last known to be alive she was found unconscious and prostrate on the floor of her room with her feet extending over the sill of the door, which it was her custom to close and lock at night, into the hall, and with her face toward the floor and her child folded in her arms, as if she had been overcome on attempting to leave the room; that she was carried from the room to the roof of the extension in the rear, and from there to the extension of the Rothschild house and into a rear room and placed on a bed, and that although she did not rally or regain consciousness, she showed distinct signs of life, and that her heart was beating feebly and she was breathing indistinctly to the eye, and was alive a very short time after being placed on the bed. The learned counsel for the heirs and next of kin in effect concedes that the evidence shows that Mrs. St. John was alive ten or fifteen minutes after the testator was last known to be alive. Counsel for other parties claim, and the evidence bears out their contention, that she was alive for a period considerably longer than ten or fifteen minutes after the testator was heard on the fourth floor. The inference is fairly warranted by the evidence that the testator could not have remained alive ten minutes where he was last heard on the fourth floor and where his charred body was subsequently found, no matter at which of the two points it was found. When the heat and pressure broke the skylight and the flames went through the roof to a height of twenty feet, it is altogether probable that they broke the window in the partition on the fourth floor, which was not far from where he was, and that the entire hallway on that floor was enveloped in flame, including the stairways up and down. Alice White jumped from her window before the firemen came, and before she jumped all was silent on the fourth floor, indicating that the testator and the maids could not or dared not speak for fear of suffocation. The flames must have been then enveloping the hallway and stairway, for she was quite severely burned, and she had only been to her door, which was twenty-two feet toward the rear from the head of the servants' stairway, and after that and before Mrs. St. John was rescued, the flames enveloping the stairways and hallways and belching out through the roof, are described

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by one of the firemen as "a raging furnace on the inside all the way up through the stairways." No one, except those who escaped, reached a window. The finding, therefore, that Mrs. St. John survived the testator is fairly sustained by the evidence.

The learned counsel for the next of kin and heirs at law, while insisting that no finding of survivorship is warranted as between the testator and his wife and Mrs. St. John, yet contends that if the court should decide otherwise, then it should have been found that Mrs. Andrews survived her husband and that the residuary bequest either to the Ohio corporation or the Smithsonian Institution would be void as to one-half, for it would be in violation of chapter 360 of the Laws of 1860, which provides as follows: "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half and no more)."

The preponderance of the evidence shows that the body of Mrs. Andrews, so burned that it fell apart, was found in the hallway on the second floor a few feet from the door of her room, although there is evidence that it was found on the first floor at the foot of the main stairway. There is no other evidence shedding any light on the time of her death. On this point, under the rule already stated, for the purpose of determining property rights, it would have to be assumed that she and her husband died at the same time. If they died at the same time, then the testator could not be said to have left a wife him surviving. If, therefore, the statute only prohibits such gifts when the testator leaves a wife surviving him, then the burden was upon the next of kin to establish that fact, for upon it their right to participate, if they could participate in any event, depended. (*Garvey v. Union Trust Co.*, 29 App. Div. 513; *Garvey v. U. S. Fidelity & Guaranty Co.*, 77 id. 391. See, also, *Gallagher v. Crooks*, 132 N. Y. 338; *City of Cohoes v. D. & H. C. Co.*, 134 id. 397.) There being no evidence to justify a finding that the wife survived her husband, as to Mr. and Mrs. Andrews the case falls within the general rule applicable to deaths in a common disaster. It is contended, however, that the scope of

the statute is not confined to cases where a husband leaves a wife surviving, but that the will is invalid as to such bequest if the testator have a wife living at the time he makes the will. It is now well settled that a bequest or devise in violation of this statute is void and may be taken advantage of by others than those enumerated in the act of 1860, and consequently the heirs or next of kin have a standing in court to be heard on the question. (*Robb v. Washington & Jefferson College*, 103 App. Div. 327; *affd.*, 185 N. Y. 485.) It is claimed that there is no authoritative decision on the precise point now presented; but I think the courts have considered that the validity of such bequests depends on survivorship of one of those enumerated in the act. (See *Robb v. Washington & Jefferson College*, *supra*; *Amherst College v. Ritch*, 151 N. Y. 282, 334; *Matter of Walker*, 136 *id.* 20, 26.) A will takes effect not at the time of its execution, but on the death of the testator, and its validity and construction depend not upon the law at the time of its execution, but at the date of his death. (*Parker v. Bogardus*, 5 N. Y. 309; *Doubleday v. Newton*, 27 Barb. 431; *Moultrie v. Hunt*, 23 N. Y. 394.) The purpose of the statute was not to disqualify the beneficiary from taking, nor to prohibit a husband from *making* a will containing such a disposition of property but to provide that in case a testator should die leaving such a survivor and leaving more than one-half of his estate to such charitable use, the bequest should be void except to the extent authorized by the statute. The object of the Legislature was not to compel a testator to make provision for his wife and family, but to admonish him of their claims upon his bounty and to invalidate in part such a disposition of property in the event of his leaving a wife, child or parent him surviving. (*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Allen v. Stevens*, 161 *id.* 122; *Hollis v. Drew Theological Seminary*, 95 *id.* 166.) No other construction of the statute would be reasonable. If the word "having" therein is to be construed as relating to the time of making the will, then the statute would have no application to marriages subsequent to the making of the will. A testator at the time of making a will seldom knows the value of the estate which he will leave. If the statute refers to the family status at the time of making the will, it must refer to his property status at that time also, which clearly it does not. The application

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of the statute depends upon an inquiry with respect to the value of the estate *left*, and it is the reasonable construction that the word "having" should be "leaving" him surviving.

In the view we take of the construction of the statute of 1860, it becomes unnecessary to decide the conflicting contentions of the next of kin and the Smithsonian Institution with respect to the ownership of that part of the residuary fund which could not be bequeathed to a charitable use under the provisions of that statute if applicable; and, with respect to the claim of the Smithsonian Institution, that if the Andrews Institute for Girls could not take all the residue it could not take any.

The Smithsonian Institution further claims that the bequest to the Ohio corporation to be formed failed because the testator intended the bequest to vest immediately upon the death of his wife, if at all, and that since she did not survive him, it became a gift *in presenti* at his death, and the corporation not being then *in esse*, the bequest failed, and the property vested in it, under the alternative clause of the will. The trial court found that the Andrews Institute for Girls takes all the residue, and that neither the Smithsonian Institution nor the heirs or next of kin take anything. Mrs. Andrews was much younger than her husband, and doubtless he contemplated her surviving him many years. He made bountiful provision for her support during life, and then made liberal bequests to those of his relatives whom he regarded as worthy of his bounty, and intended that the residue of his property, no matter how much or how little, should be used "for the purpose of establishing an institution" in the town of Willoughby, Lake county, Ohio, upon a farm owned by his wife, and formerly owned by him, and if that should not be available, "then on other suitable premises" in said town "for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self-supporting." He specified the subjects upon which instruction should be imparted to the girls, and gave directions with respect to the erection of a suitable building and maintenance of the institution, and then directed that the charter of the corporation should provide "if and so far as may be consistent with law and practicable" that the corporation should be managed by a board of five directors, consisting of the Governor

of the State, the member of Congress for that district, the treasurer of that county, and the mayor of Willoughby, and their successors in office, and his brother-in-law St. John, whose successor should be a resident of the town selected by the Governor. The direction with respect to the formation of the corporation was as follows: "I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother, or the life of the longest liver of them, to procure under the laws of the State of Ohio, an incorporation to be formed," with the powers specified. It is to be observed that it was only in the event that his primary desire to endow the Ohio corporation could not be lawfully accomplished that he intended that the bequest should go the Smithsonian Institution. The policy of the law favors upholding charitable bequests, whether they are to be administered at home or abroad, and if to be administered abroad, the right of the foreign legatee to take will be determined by our courts before directing the executors to turn over the fund, but under the law of the foreign jurisdiction and unaffected by our laws relating to accumulations and perpetuities. (*Matter of Huss*, 126 N. Y. 537; *Amherst College v. Ritch*, 151 id. 282; *Hollis v. Drew Theological Seminary*, 95 id. 166; *Hope v. Brewer*, 136 id. 126; *Congregational Unitarian Soc. v. Hale*, 29 App. Div. 396; *Matter of Sturgis*, 164 N. Y. 485; *Robb v. Washington & Jefferson College*, *supra*.) The charity which the testator was desirous of establishing in Ohio was commendable, and the court should not be astute to discover legal objections to giving effect to his intention. The will does not, as claimed by the counsel for the Smithsonian Institution, show that the testator did not intend that the Ohio corporation should take if not formed before the death of his wife. He provided in effect that it might be formed by the other executor and trustee, should it not be formed before her death, and he expressly provided that it should take the bequest even though she predeceased him. There is no force in the argument that this was merely a restriction or limitation as to the period within which the corporation *must* be formed, or that it does not carry with it either expressly or by implication permission to form it after the death of his wife. His intention, thus clearly manifested, and public policy demand that the Andrews Institute, which his executor caused to be incorporated pursuant

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to his command, and which fulfills in all respects his purpose, shall receive the bequest if consistent with the rules of law. (*Amherst College v. Ritch*, 151 N. Y. 282; *Dammert v. Osborn*, 140 id. 30.) The will is susceptible of the construction that the bequest was to vest in the corporation, if *in esse*, upon the death of his wife, but if not then *in esse*, that it was to vest in it when formed by the trustee who survived his wife, and in such a case a *present* bequest is not to be presumed, and if a construction that the bequest was to vest in the corporation when formed would render it valid, that construction should prevail. (*Burrill v. Boardman*, 43 N. Y. 258; *Robb v. Washington & Jefferson College*, *supra*; *People v. Simonson*, 126 N. Y. 299.) If we should construe the will as indicating an intent on the part of the testator that the bequest was to vest on his own death if his wife predeceased him, and on her death if she survived him, even though the corporation had not then been formed, it would, doubtless, unless sustainable under chapter 701 of the Laws of 1893, be void, since the beneficiary was not then *in esse*, and in that view would have been incapable of taking, and its subsequent incorporation would not avail it. (*Booth v. Baptist Church*, 126 N. Y. 215; *White v. Howard*, 46 id. 144. See, also, *Murray v. Miller*, No. 1, 85 App. Div. 414.) The corporation was required to be formed within two lives in being, and in the case of bequests for charitable use, the law, without regard to whether chapter 701 of the Laws of 1893 applies or not, permits the suspension of ownership and the power of alienation during a period necessary to form a corporation, not exceeding two lives in being at the death of the testator, to take the bequest which in such circumstances is valid as an executory devise or bequest. (*Tilden v. Green*, 130 N. Y. 29; *Burrill v. Boardman*, 43 id. 254; *Inglis v. Trustees of Sailor's Snug Harbour*, 3 Pet. 99; *Shipman v. Rollins*, 98 N. Y. 311.) In the case at bar it was impossible to form the corporation pursuant to the will before her death.

The learned counsel for the Smithsonian Institution also contends that the Andrews Institute for Girls was not legally incorporated, and, therefore, cannot take the bequest. It is not claimed that the *regularity* of the incorporation or organization can be questioned collaterally, as clearly it cannot; but it is insisted that the corporation may be shown to have no legal existence because incorporated

in violation of the Constitution of that State. Owing to the provisions with respect to the management of the corporation by a board of five trustees, four of whom were to be officials, it was deemed advisable to apply to the Legislature for the enactment of a general law under which the corporation could be formed. The act was passed on the 19th day of March, 1902.* It contains no specific reference to this will or to the bequest to the Ohio corporation to be formed. The title of the act, "An act to provide for the administration of charitable trusts in certain cases," is general, and the act is general in terms and relates to devises and bequests for charitable uses, "or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this State," theretofore or thereafter made, and provides for the formation of a corporation by the executor and officials designated in the will, referring to wills providing for the management of the corporation by a board of trustees or directors consisting in part of officials of the State, and of the county, municipal corporation, and member of Congress for the district in which the charity is to be administered, or institution or school is to be located. The Andrews Institute was thereafter incorporated by filing a certificate of incorporation which does not specify and was not required to specify the particular statute or statutes under which it was filed. Many general statutes of the State are cited from which it is claimed authority for the incorporation exists, with the possible exception of the management of the corporation by such officials, and this statute of March nineteenth is relied upon as authority for the corporation in that regard. The contention is that the statute is in contravention of section 1 of article 13 of the Constitution of Ohio, which provides that "the general assembly shall pass no special act conferring corporate powers." It is quite likely that the corporation could be sustained under other statutes, even if the provisions of the act of March 19, 1902, with respect to the composition of the board of trustees should be declared invalid. (See *Bates An. Ohio Stat.* † §§ 3235, 3236, 3238, 3726, 3727, 3734; *Id.* § 4015-67 *et seq.*, p. 2279, § 1 *et seq.*; 53 O. L. 33, § 1 *et seq.*) These statutes, among other things, authorize the formation of a corporation for any purpose for which individuals may lawfully join, except for carrying

* See 95 O. L. 61.—[REP.]

† See 8d ed.—[REP.]

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on professional business, and provide for filling vacancies in the board of trustees from any cause, and for the management of schools or academies receiving bequests and devises by the Court of Common Pleas, where the management is not otherwise provided for, and for the execution of the trusts upon which the property was bequeathed or devised. Nor does the argument that this is a special act in violation of the Constitution seem tenable. (*State ex rel. v. Spellmire*, 67 Ohio St. 86.) It is exceedingly doubtful whether, in any event, we would be justified in refusing to allow the Andrews Institute to take this bequest upon the theory that it has no corporate existence, when, so far as appears, it is recognized by the State, and no proceeding has been taken to have its charter either annulled or forfeited. (*State v. Gardner*, 54 Ohio St. 24; *Bartholomew v. Bentley*, 1 id. 37; *Trustees of Vernon Society v. Hills*, 6 Cow. 23; *Lamming v. Galusha*, 81 Hun, 247; Cooley Const. Lim. [5th ed.] 311; Cook Corp. [5th ed.] § 637; Thomp. Corp. § 501; *Coast Co. v. Spring Lake*, 56 N. J. Eq. 615; *Merrick v. Van Santvoord*, 34 N. Y. 208; *United States Vinegar Co. v. Schlegel*, 143 id. 537.) Under the authority to determine whether the legatee is competent to take the legacy, we, of course, are authorized to determine the extent of the corporate authority, but the corporate existence is quite another thing. While I think the Andrews Institute was legally incorporated, it is at least a *de facto* corporation acting under color of law, and apparently recognized by the State, under whose laws it has sprung into existence, and with little likelihood of its corporate existence being drawn in question.

The learned counsel for the heirs and next of kin claims that the testator died intestate as to the rents and income of the residuary estate, accruing between the time of his death and the date of incorporation of the Andrews Institute, and that the next of kin take such rents and income. This claim is founded upon section 51 of the Real Property Law* and section 4 of the Personal Property Law,† which forbid the accumulation of rents and income respectively, except for the benefit of minors during minority, and upon section 53 of the Real Property Law and section 2 of the Personal Property Law, which respectively provide with respect to the accumulation of rents and income, that where there is a suspension of the

* Laws of 1896, chap. 547.—[REP.]

† Laws of 1897, chap. 417.—[REP.]

power of alienation or of ownership in consequence of a valid limitation of an expectant estate, "during the continuance of which the rents" or income "are undisposed of and no valid direction for their accumulation is given," the rents or income "shall belong to the persons presumptively entitled to the next eventual estate."

By the 7th clause of the will the executor and executrix were *directed*, "as soon as they may deem advisable, but within two years after" the decease of the testator, to sell all of his real estate and invest the proceeds in interest-paying securities, and he therein gave *them* and his *trustees* "power to invest and reinvest" all of his estate or any part thereof. The learned counsel for the heirs contends that the sole purpose of this power of sale was to enable the executor and executrix and trustees to execute the trust for the benefit of the widow, and that since she did not survive the testator that trust never came into existence and, therefore, there was no equitable conversion of the real estate. He argues from this that the title to the real estate vested in the heirs, subject to be divested upon the incorporation of the educational institution as directed by the testator, and that, consequently, they would be entitled to the rents, issues and profits until their title became divested. It is not essential that we should agree or disagree with the ultimate result that would flow from this process of reasoning, for we think there was an equitable conversion of the real estate, but it may be observed that the Smithsonian Institution would not be without argument to show that if title did not vest in the personal representatives or trustees it vested in that institution. The rule is that if it be essential to carry out the plan of the testator that his real estate be converted into personalty, then the real estate will be deemed converted into personalty as of the date of his death. Here the personal representatives were directed not only to incorporate and organize the educational institution, but in effect to turn over to it the residuary estate in cash to enable it to purchase a site and erect a building with one-tenth thereof, and to provide for the support and maintenance of the institution with the remaining nine-tenths. This intention is quite clear, for in the 5th clause of the will, after giving directions with respect to the purchase of a site and the erection of a building and the proportion of the amount received to be used for that purpose and the investment of the remainder, he, in pro-

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viding for deferring the completion of the institution in the event that the one-tenth of the bequest should be insufficient, uses this significant language: "If when the said sum shall be received by the said corporation." It is of course possible that the corporation might be able to take the property as it stood at the time of the death of the testator, subject to the payment of his debts and other bequests and devises, but manifestly that was not what he intended and it would have been quite impracticable. On this point I think that no significance is to be attached to the fact that, in giving this residuary estate to the corporation to be formed, the testator used the word "devise" as well as "bequeath." There was, therefore, an equitable conversion of the real estate, and the plaintiff, if not by express authority, at least by necessarily implied authority, held the property in trust to form the corporation and deliver it over in money in accordance with the wishes of the testator, which constitutes a perfectly lawful trust as to personalty, which by the equitable conversion the residuary estate has become. The bequest was, in a sense, in trust to the Ohio corporation, but not in a strict sense which would invalidate it as contravening the statutes against perpetuities and accumulations of income and rents,* because gifts in trust for charitable uses have long been deemed absolute gifts so far as the settlor or testator is concerned, in order to enable the beneficiary of a commendable endowment, bequest or devise to take. (*Holland v. Alcock*, 108 N. Y. 312; *Matter of Griffin*, 167 id. 71; *Bird v. Merkle*, 144 id. 544.) The scheme for the administration of the trust in this case would be valid under our laws, but its validity depends upon the law of Ohio, where it is to be administered, and it is for our courts to decide the question before turning the fund over to the beneficiary. (*Robb v. Washington & Jefferson College*, 103 App. Div. 327, 356, 357; *Matter of Sturgis*, 164 N. Y. 485.)

It is not contended but that the laws of Ohio authorize the execution of such a trust. The learned counsel for the heirs and next of kin, however, strenuously argues that inasmuch as this income accumulated before the property vested or could vest in the Ohio corporation, its ownership depends on our laws; and there is much force in that contention. However, even under our laws, we think that the Andrews Institute took this income. It is to be observed

* See statutes *supra*, and Real Prop. Law, § 32.—[REP.]

that the testator gave no direction, either valid or invalid, for the accumulation of rents or income. It is not, therefore, a case of a void legacy. The claim seems to be that, although all of the residuary estate was lawfully bequeathed and devised to the Andrews Institute for Girls, yet that as to the income and rents earned and accruing therefrom after the death of the testator — who, being dead, did not and could not own them — he died intestate. It is conceded by the learned counsel for the heirs and next of kin that if the act of 1860 does not apply, the Andrews Institute for Girls took the entire residuary estate upon its incorporation as an executory bequest or devise; but he insists that the income and rents, when they accrued, vested in some one, as the statutes prohibited their being accumulated and added to the principal, whether by the express or implied direction of the testator, or by his having failed to give any direction concerning them, and that they could not vest in the foreign corporation because it was not then in being. It cannot be denied that there is force in this contention, and that there are decisions, although not in point on the facts, tending to sustain it. (See *Vail v. Vail*, 4 Paige, 317; *Pray v. Hegeman*, 92 N. Y. 508; *Hascall v. King*, 162 id. 134; *Manice v. Manice*, 43 id. 303; *United States Trust Co. v. Soher*, 178 id. 442; *Killan v. Allen*, 52 Barb. 605.) A bequest to a corporation to be formed after the death of the testator, being valid, it would seem to follow, although there appears to be no controlling precedent on the point, that in the absence of any direction with respect to the income, the testator intended that the corporation should take the income, if any should accrue prior to its formation, as an increment of the principal, and that it should not be regarded as income within the contemplation of the statutes regulating perpetuities and accumulations of income, and that the executor or trustee, who is holding the property by express or implied authority for the corporation when formed, would be authorized also to hold the increase thereof, and that the corporation should take both, as if it had been formed as soon as the bequest could have vested. (See *Hendricks v. Hendricks*, 3 App. Div. 604; *affd.*, 154 N. Y. 751; *Dunklee v. Butler*, 38 App. Div. 99; *Fowl. Char. Uses, Tr. & Don.* 150, 151, and note.) It was essential that some period should elapse to enable the executor to form the corporation, but that might have been very short. The fact

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that in this case it was unavoidably extended cannot affect the question. In the case at bar, however, I think it is immaterial whether the Andrews Institute could take this increase under the will; for if not, I am of opinion that it would take it under the statutes, as being manifestly entitled to the next eventual estate, upon the theory that the estate had not then vested in the corporation, which was not in existence; and in that view, the corporation would take the next eventual estate. (See *Matter of Crossman*, 113 N. Y. 503.) Within the plain meaning and intent of the statutes, it was the *expectant* estate which this corporation now takes, concerning which there was a valid limitation suspending the power of alienation and the ownership, and as it is the party *first* taking the estate after the *suspension*, it necessarily is the party entitled to the next eventual estate. (See *Manice v. Manice*, 43 N. Y. 303, 385; *United States Trust Co. v. Soher*, 178 id. 442.)

The learned counsel for the plaintiff argues that the Smithsonian Institution is the party entitled to the next eventual estate, upon the theory that the statutes have reference to the party thus presumptively entitled at the time the income accrues, and that inasmuch as the Andrews Institute for Girls had not been incorporated at the time the income in question was earned, it could not at that time have been presumptively entitled to the next eventual estate. The Court of Appeals did not take that view in *United States Trust Co. v. Soher* (*supra*), and the Smithsonian Institution makes no claim to income unless it is entitled to all or part of the principal. I am of opinion that the same liberal rule permitting such bequests to a corporation to be formed, should be extended to authorize the holding of the income, to enable the corporation when formed to take both, upon one or the other of these theories, even though that be an exception to the general rule.

It follows that the judgment should be affirmed, with separate bills of costs to all parties separately appearing, to be paid out of the estate.

PATTERSON, P. J., INGRAHAM and CLARKE, JJ., concurred.

Judgment affirmed, with separate bills of costs to all parties separately appearing, to be paid out of the estate. Settle order on notice.

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FRANKLIN C. ELDER, Plaintiff, v. BANKERS' LIFE INSURANCE
COMPANY, Defendant.

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**Insurance — reserve fund — determination of amount thereof — when
section 52 of the Insurance Law applies.**

When an insurance company originally organized as a fraternal organization has thereafter successively incorporated as a mutual company and as a stock company, under chapter 690 of the Laws of 1893, the valuation of policies issued when the corporation was a mutual company for the purpose of ascertaining the amount of reserve, should be made under section 52 of the Insurance Law, if such valuation does not violate any provision, express or implied, of the original contract of insurance. The reserve need not be determined by valuing such policies as whole life policies under section 86 of the Insurance Law.

In the absence of any contract between the parties as to how a policy shall be valued in order to estimate the amount of reserve to be carried, the Legislature may determine the method of arriving at such valuation.

This controversy is submitted under section 1279 of the Code of Civil Procedure upon an agreed statement of facts, as follows: The Bankers' Life Insurance Company of the City of New York is a corporation originally organized as a fraternal organization March 24, 1869, under the name of "Bank Clerks' Mutual Benefit Association of the City of New York." On the 15th day of August, 1884, it was formally incorporated under the same name and was thereafter on June 28, 1893, reincorporated under article 6 of chapter 690 of the Laws of 1892, known as the "Insurance Law," for the purpose of doing business on the regular assessment or co-operative plan under the same name. By an order of the Supreme Court of the State of New York, made on April 27, 1894, its name was changed to the Bankers' Life Insurance Company of the City of New York.

Pursuant to the provisions of chapter 693* of the Laws of 1893, entitled "An act authorizing all insurance companies transacting business on the co-operative or assessment plan to re-incorporate as a stock corporation under its existing corporate name," it reincorporated as a stock corporation on the 2d day of August, 1899, with a capital stock of \$100,000, and has ever since been doing business as a stock company.

* *Sic.* Laws of 1893, chap. 690. — [R&P.]

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At the time of this reorganization there was no statute in the State which laid down a definite rule for the valuation of such policies as had been issued by the Bankers' Life Insurance Company as an assessment company organized under article 6 of the Insurance Law, and these policies were valued by the Department of Insurance of the State of New York as ordinary life policies. In 1901, however, section 52 of the Insurance Law* was amended so as to provide for a valuation by adding the following clause: "This section shall apply to insurance corporations organized under or subject to article six of the Insurance Law as well as to insurance corporations organized under special charters or articles two and ten of the Insurance Law; all contracts, policies and certificates issued by such corporations prior to accepting the provisions of this chapter shall be valued as one year term insurance at the ages attained, excepting when such contracts, policies or certificates shall provide for a limited number of specified premiums or for specified surrender values, in which case they shall be valued as provided in article two, section eighty-four of the Insurance Law." Section 52 under the last amendment† reads as follows: "In the case of any corporation organized under or subject to article six of the Insurance Law, which corporation has amended its charter and is now operating under article two of the Insurance Law, all contracts, policies and certificates issued prior to its reincorporation, shall be valued as one year term insurance at the ages attained excepting when such contracts, policies or certificates shall provide for a limited number of specified premiums or for specified surrender values, in which case they shall be valued as provided in article two, section eighty-four of the Insurance Law."

The policies issued by the Bankers' Life Insurance Company as a mutual company all called for a stipulated premium and for the payment of a definite amount of insurance known as "face value." But they also contained an additional clause known in mutual insurance as a "safety clause," by the terms of which it was agreed that "should an emergency arise through epidemic or otherwise, whereby the said premiums, supplemented by the Reserve or Emer-

* This section was amended by Laws of 1893, chap. 725, and Laws of 1901, chap. 722.—[REP.]

† See Laws of 1905, chap. 574, and Laws of 1906, chap. 326.—[REP.]

gency Fund, are insufficient to meet the mortality requirements of the company, additional premiums equitably adjusted may be levied by the Board of Managers to meet such an emergency," and when the company reincorporated as a stock company in August of 1899, it waived this "safety clause," agreed to pay the "face value" of these policies, and sent a written waiver to that effect to each policyholder.

The new charter of the stock company contained the following assumption of liability: "The Bankers' Life Insurance Company of the City of New York reincorporated, shall be subject to the existing liabilities of the present company, including all contracts, policies or certificates with its members, and to the same extent as though not reincorporated as a stock corporation."

The plaintiff, being of full age, is the holder of defendant's two policies, No. 2614 and 2615, for Twenty-five hundred (\$2,500) dollars each, issued on the 30th day of December, 1895, calling for the payment of annual premiums or considerations aggregating One hundred thirty-nine $84/100$ (\$139.84) dollars, which were issued by the defendant when operating as a mutual company, which were assumed by defendant pursuant to section 52 of the Insurance Law when it reincorporated as a stock company, and which are now in full force and effect.

Defendant deeming that it holds as a liability an excessive reserve on policies written between June of 1893 and August of 1899, has declared its intention of valuing these policies under section 52 of the Insurance Law as one-year term policies, and to keep on hand as a reserve therefor only the amount required for one-year term policies. The plaintiff, deeming that these policies should be valued as whole life policies, because of the fact that on assuming the business of the mutual company the stock company waived the extra assessment provided in its assessment policies, seeks to enjoin the defendant from so doing, and that it be directed to hold as reserve liability the reserve called for by whole life policies under section 86 of the Insurance Law.*

Plaintiff demands judgment that the defendant be enjoined from valuing policies issued by it as an assessment corporation between

* This section has been amended by Laws of 1901, chap. 514; Laws of 1903, chap. 566; Laws of 1904, chap. 468, and Laws of 1905, chap. 113.—[REp.]

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June, 1893, and August, 1899, in any other way but as whole life policies, and for a mandatory injunction directing it to keep a reserve on such business equal to whole life reserve on such policies. Defendant prays for judgment that the submission of the plaintiff be dismissed, and that it be decreed that a reserve on policies issued by it when it was an assessment corporation, between June of 1893 and August, 1899, equal to one-year term policies, is in compliance with section 52 of the Insurance Law.

George W. Carr, for the plaintiff.

D. Cady Herrick, for the defendant.

SCOTT, J. :

The defendant comes within the express terms of section 52 of the Insurance Law, and unless there is something in the contract between plaintiff and defendant which would be violated if the section is to be applied, we can see no reason why the section should not be complied with. We are unable to find, from anything contained in the agreed statement of facts, that the contract between the parties, or the statute at the time that contract was made contained any provision relative to the valuation of policies such as plaintiff holds. In the absence of any contract between the parties as to how an insurance policy shall be valued in order to estimate the amount of reserve to be carried, the Legislature has the right to determine how such valuation shall be arrived at. It is not said that a valuation according to the method prescribed by the Legislature will result in the maintenance of an insufficient reserve, although it is averred that a valuation upon some other basis would result in the establishment of a larger reserve. If the basis of valuation fixed by the Legislature is improper or unwise it is to the Legislature that appeal should be made for the establishment of a different basis. All that we can do is to determine whether section 52 of the Insurance Law applies to the policy which plaintiff holds, and, if so, whether it is violative of the contract between plaintiff and the defendant. We are of opinion that the section does apply to plaintiff's policies and that it does not violate any provision, express or implied, in the contract between the parties hereto.

It follows that the judgment must be entered, without costs,

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in favor of defendant; that the plaintiff's policies, issued by the predecessor of the present defendant and assumed by the latter upon its reincorporation, are subject to valuation as one-year term policies under section 52 of the Insurance Law.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment ordered for defendant, without costs, as stated in opinion. Settle order on notice.

JONATHAN KELSHAW, Plaintiff, v. BANKERS' LIFE INSURANCE COMPANY, Defendant.

First Department, February 15, 1907.

Insurance — reorganization of assessment company as stock company — when reserve under section 84 of the Insurance Law sufficient to cover former policies.

An insurance company organized as a fraternal organization thereafter organized under the assessment plan and later as a stock company. On organizing as an assessment company it was provided that members of the former class A should be assessed one dollar for each death and that there should be set aside a fund of one dollar per 1,000 on all insurance issued on the new class B, which fund should go to meet any deficit in assessments of class A when the membership dropped below 1,000. This mortuary fund of class B was continued until the corporation organized as a stock company, when it was discontinued as no longer required. Upon the last reorganization the company carried a reserve figured under section 84 of the Insurance Law, the reserve being applicable to all classes of policies.

Held, that a sufficient reserve was maintained on the policies of former class A, and that a holder of such policy was not entitled to have an additional reserve of one dollar per 1,000 on new insurance.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

The Bankers' Life Insurance Company of the city of New York is a corporation originally organized as a fraternal organization March 24, 1869, under the name of "Bank Clerks' Mutual Benefit Association of the City of New York." On the 15th day of August, 1884,

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it was formally incorporated under chapter 175 of the Laws of 1883, under the same name, and was thereafter, on June 28, 1893, reincorporated under article 6 of chapter 690 of the Laws of 1892, known as the "Insurance Law," for the purpose of doing business on the regular assessment or co-operative plan, under the same name.

By an order of the Supreme Court of the State of New York, made April 27, 1894, its name was changed to the Bankers' Life Insurance Company of the City of New York.

Pursuant to the provisions of chapter 693* of the Laws of 1893, entitled "An act authorizing all insurance companies transacting business on the co-operative or assessment plan to re-incorporate as a stock corporation under its existing corporate name," it reincorporated as a stock corporation on the 2d of August, 1899, with a capital stock of \$100,000, and has ever since been doing business as a stock company.

In June, 1893, when the Bank Clerks' Mutual Benefit Association of the City of New York reincorporated for the purpose of doing business on the assessment or co-operative plan, it was possessed of funds and securities amounting in value to some \$112,000. The membership then consisted of 1,175 persons. The evidences of membership were a mere naked certificate entitling the person named therein to the benefits and privileges of membership without setting these facts forth.

As a matter of fact, pursuant to different resolutions of the membership and the directors, the membership was assessed one dollar a head on each death, and the beneficiaries named in the certificate of the deceased member received the proceeds. On the reincorporation as an assessment company it was agreed that the membership, amounting to 1,175, were to be known as Class A. It was agreed that as to them they should be assessed one dollar on each death, and the beneficiaries should be paid not less than \$1,000.

The new members who were expected to come in under the assessment or co-operative plan should be called Class B. It was agreed that as to them there should be set aside a fund of one dollar per thousand on all the insurance written each year on Class B, and determined as of the thirty-first day of December. The purpose of this fund was as follows: When the membership of Class A got to

* *Sic.* Laws of 1893, chap. 690. — [REp.]

be below 1,000 there would be a deficit on each death which the mutual company would be bound to make up, and so this one dollar a thousand was meant to create a mortuary fund for the purpose of making up such a deficiency. This mortuary fund was kept in existence until 1899, when the corporation was reorganized as a stock company, since which time it was discontinued by the management for the reason that it was deemed to be no longer required. The company having become a stock corporation, it had to carry a reserve, figured by the Department of Insurance and by the company on the basis of section 84 of the Insurance Law,* and it carried this reserve on all the different kinds of policies, to wit, on the fraternal policies of Class A; on the assessment policies of Class B, and also on the new policies it issued as a stock company. No separate mortuary fund for the protection of Class A was thereafter ever kept by the company, or reported in the annual reports filed each year by the company with the Superintendent of Insurance pursuant to sections 44 and 45 of the Insurance Law.† It was deemed by the management sufficient that the reserve called by section 84 should be kept on hand, and that they should add to this one dollar a thousand on all Class B insurance in force on the thirty-first day of December of each year, but that it was not necessary for them to increase this fund by one dollar a thousand on all the new business written as a stock company since 1899.

Plaintiff, being of full age, is a member of Class A in good standing, having paid all calls upon his certificate of membership, No. 296.

Plaintiff demands judgment that the defendant be directed to create, maintain and keep a fund of one dollar a thousand on all its outstanding risks covering not only Class B business written between June 28, 1893, and August 21, 1899, but also upon all business written since August 21, 1899, and all business to be written thereafter.

Defendant prays for judgment that the submission of the plaintiff be dismissed and that the defendant upon keeping the reserve called for by section 84 of the Insurance Law upon Class A policies

* This section has been amended by Laws of 1893, chap. 147; Laws of 1901, chap. 346, and Laws of 1906, chap. 326.—[REp.]

† These sections have been amended by Laws of 1897, chap. 493, and Laws of 1906, chap. 326.—[REp.]

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and setting aside a mortuary fund of one dollar per thousand upon all Class B business written between the 20th day of June, 1893, and the 21st day of August, 1899, be decreed to have fulfilled its obligations to Class A.

George W. Carr, for the plaintiff.

D. Cady Herrick, for the defendant.

SCOTT, J.:

If the provision for adding to the reserve for the protection of Class A policyholders of the sum of one dollar for each one thousand dollars of insurance written in Class B policies can be considered in any sense a contract between the company and the Class A policyholders, there was certainly no such contract respecting insurance written under the present organization of the company. At present all outstanding policies, as well those known as Class A as the later ones, are protected by the reserve required and provided for by the Insurance Law, and this is to be presumed to be sufficient. We see no ground, therefore, for the contention that, in addition to this legal reserve, there should be set aside one dollar for each one thousand of new insurance written by the present corporation.

There must be judgment, without costs, for the defendant, to the effect that it will have fulfilled its obligations to plaintiff, as the holder of a Class A policy, by keeping for the protection of his policy the reserve called for by section 84 of the Insurance Law, and setting aside a mortuary fund of one dollar per thousand dollars upon all insurance written under Class B policies.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment ordered for defendant, as stated in opinion.

JOHN BERRYMAN, Plaintiff, v. BANKERS' LIFE INSURANCE COMPANY,
Defendant.

First Department, February 15, 1907.

Insurance — dividends may be paid from surplus only — when policy holder cannot recover dividend illegally declared — when company cannot recover former dividends paid.

An insurance company can only pay dividends out of surplus and profits; they cannot lawfully be paid out of capital contributed by shareholders for the purpose of carrying on the company's business and for the protection of its creditors. Such dividends are prohibited by section 594 of the Penal Code and section 83 of the Insurance Law.

Although illegal dividends, which depleted the capital, have been declared, a policyholder who has not yet drawn his dividend cannot compel the payment thereof, when the payment would necessarily be made out of the capital and not out of the surplus, as the officers of the corporation would be required to do an illegal act.

But when former dividends paid to the insured are not shown to have impaired the capital, they cannot be recovered by the insurer or declared to be a lien upon the policy on the ground that they were not formally declared by the board of directors or by the executive committee, if neither the charter nor the by-laws specifically provided by whom the dividend should be declared.

When such company has paid dividends to a policyholder who stands in the position of a creditor without notice of any infirmity in the manner in which the dividend was declared, the payment must be considered to have been voluntary and cannot be recovered. Even though the payment were unauthorized, the acquiescence of the company therein is a ratification, and the payment cannot be charged as an offset against the policy.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

The Bankers' Life Insurance Company of the City of New York is a corporation originally organized as a fraternal organization on March 24, 1869, under the name of the "Bank Clerks' Mutual Benefit Association of the City of New York."

On the 15th day of August, 1884, it was formally incorporated under chapter 175 of the Laws of 1883, under the same name, and was thereafter, on June 28, 1893, reincorporated under article 6 of chapter 690 of the Laws of 1892, known as the "Insurance Law," for the purpose of doing business on the regular assessment or co-operative plan, under the same name. By an order of the

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Supreme Court of the State of New York, made April 27, 1894, its name was changed to the Bankers' Life Insurance Company of the City of New York.

Pursuant to the provisions of chapter 693* of the Laws of 1893, entitled "An act authorizing all insurance companies transacting business on the co-operative or assessment plan to re-incorporate as a stock corporation under its existing corporate name," it re-incorporated as a stock corporation on the 2d day of August, 1899, with a capital stock of \$100,000, and has ever since been doing business as a stock company.

As a stock company the Bankers' Life Insurance Company was reasonably successful at the start, and it gradually increased its surplus so that on the 1st day of January, 1902, it had, as appears by its report, a surplus, beyond its capital of \$100,000, of \$185,576.

In the fall of 1902 the stock control of this company, which was then lodged in two of its directors, William C. Demarest and Charles H. Fancher, was transferred to a corporation known as the Knickerbocker Investment Company. A voting trust agreement was entered into by the officers of the Knickerbocker Investment Company without the knowledge or consent of the stockholders, by the terms of which the stock control of the Bankers' Life Insurance Company was vested for the period of five years in three voting trustees, Foster M. Voorhees, Edward C. Stokes and William Sherer, who promptly elected themselves and certain of their friends and relatives into office. Foster M. Voorhees became president of the company; William Sherer, vice-president, and his son general counsel. Edward C. Stokes became a director and the position of third vice-president was created for his brother, Howard K. Stokes.

Before assuming office the stock had always paid six per cent dividends. They ran the company at a rate of expense not commensurate with the premium income of the company. They devised different schemes to make their policies attractive. Among other things they did was to declare and pay out dividends on participating policies which had never been earned, and armed with literature showing the payment of these dividends, their agents

* *Sic.* Laws of 1893, chap. 690.—[REP.]

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sought to procure business by showing the attractive results obtained.

During the year 1902 the company lost \$46,562 in surplus and the officers declared and paid \$21,035 dividends to policyholders.

During the year 1903 the company lost \$75,542 in surplus and the officers declared and paid \$25,827 dividends to policyholders.

During the year 1904 the company made an apparent gain of \$23,253 and declared and paid dividends of \$35,401 to policyholders.

During the year 1905 the surplus of \$86,724 and the capital of \$100,000 suffered further diminution, so that the statement of December 31, 1905, showed that the entire surplus had been wiped out and the capital reduced from \$100,000 to \$28,403, an impairment of \$71,597 in its capital, and yet during that year the company declared to the policyholders \$81,000 in dividends, of which \$49,000 was paid and \$32,000 not yet withdrawn.

A tabulated statement showing capital and surplus from January 1, 1902, to December 31, 1905, together with losses or gain on the business and dividends paid policyholders is as follows :

Year.	Capital (\$100,000) and surplus.	Loss or gain during the year. Loss.	Gain.	Dividends paid policyholders.
January 1, 1902	\$285,576			
December 31, 1902	239,013	\$46,536		\$21,035
December 31, 1903	163,471	75,542		25,827
December 31, 1904	186,724		\$23,253	35,401
December 31, 1905	28,403	158,321		49,537
		\$280,426	\$23,253	\$131,800
		23,253		

Net loss between January 1,

1902, and December 31, 1905. \$257,173

Dividends declared, but not paid..... 31,019

\$162,819

The capital was found to be impaired by the New York Insurance Department in the spring of 1906 and the stockholders of the company were called upon to make good the impairment. All the minority stock which was controlled by the management and their friends, with the exception of five shares of stock, refused to make

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good any portion of the impairment, and the Knickerbocker Investment Company was compelled to pay and did pay into the treasury of the company the whole amount of the impairment, amounting to some \$72,000. Before doing so, however, the Knickerbocker Investment Company insisted that the voting trust agreement be abolished, and the directors and officers of the Bankers' Life Insurance Company should resign.

This was finally acquiesced in, every officer and director of the company resigned, and in their place were elected the present management of the Bankers' Life Insurance Company. Upon an examination made by the new management into the affairs of the company it was ascertained that the capital and surplus of \$285,000, which existed in 1902, had been reduced to \$28,000 in 1906. The corporation sustained a loss of \$257,000 in four years. Its reports during that time show that its rate of mortality was lower than the expected rate, and that it had suffered no loss in its investments. And it was found that although losing \$257,000 during these four years they had paid over \$131,000 of dividends and had declared and not paid out some \$31,000 of dividends. This latter item was considered a liability by the Department of Insurance and treated as such in the report of 1905.

These dividends had never been passed upon by the board of directors, but were paid by the officers. With an insignificant exception the dividends had not been passed upon by the executive committee. Neither the charter of the company nor its by-laws provide how dividends shall be declared and paid. Prior to 1902 all dividends had always been passed upon by the board of directors.

Following are all the by-laws which describe the powers of the board of directors and the respective officers:

1. The officers of the company shall consist of a president, a first, a second and a third vice-president, a secretary, an assistant secretary and a treasurer, and two or more of said offices, except that of president, may be filled by one individual.
2. The president shall be *ex officio* a member of all committees. In order to expedite the business of the company he shall appoint from the board of directors a finance committee of six members and an executive committee of five members, and shall provide for said

committees a clerk, who shall act as secretary and keep a correct record of the proceedings of such committees.

The president shall have the general direction and superintendence of the affairs of the company and shall render reports of same at every stated meeting of the directors.

3. The secretary, the assistant secretary and the treasurer shall perform their duties under the direction of the president. In the absence of the secretary his duties shall be performed by the assistant secretary, and in the absence of the treasurer his duties shall be performed by the secretary or the assistant secretary in the capacity of acting treasurer.

4. The officers of the company shall have power, under the rules and regulations, for the time being, of the board of directors, to negotiate contracts for business on life and for annuity, and all other contracts necessary for the company in the management of its affairs. All such contracts shall be signed by at least two of the executive officers of the company, the printing of *facsimile* signature of the president to such contracts being a compliance with this provision.

5. The executive committee, two members of which shall constitute a quorum, shall assist the president in the general management and conduct of the business of the company.

6. The board of directors shall have charge of all funds of the company and see to the safe investment thereof. All moneys shall be deposited in the name of the company in such bank, trust company or depositories as shall be designated by such board, it being required that all checks against the funds of the company shall be signed by at least two of the executive officers of the company.

The directors may determine the rates of premium, the amounts to be insured on any one life, and the terms of insurance, and shall have power to purchase, for the benefit of the company, any policies of insurance, dividends or other obligations issued by the company, and also any claims of policyholders for profits growing out of its business.

The dividends can be roughly treated in two classes: Those that have been declared and paid out, and those that were declared but have not yet been withdrawn by the policyholders, amounting, as above stated on the thirty-first day of December, to \$31,000. As

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to these latter amounts, it became obvious to the present officers of this company that they had absolutely no right to pay dividend which they knew had not been earned, and that such action on their part would render them liable to prosecution. They knew further that the impairment of the capital of the company, amounting to \$72,000 found on December thirty-first, was partly caused by the payment of unearned dividends. They felt they had no right to discriminate between the dividends declared and paid and the dividends declared but not withdrawn, and the only way was to treat them all alike. Hence the resolution passed March 28, 1906.

Upon assuming office the new board of directors in April of 1906, passed the following resolutions:

WHEREAS, an examination of the affairs of the company shows that during the following years the following dividends have been paid to policyholders, namely:

During the year 1902 the sum of.....	\$21,034 77
During the year 1903 the sum of.....	25,827 44
During the year 1904 the sum of.....	35,401 52
During the year 1905 the sum of.....	49,537 28

and during the year 1906 to date the sum of \$11,876.47.

WHEREAS, on the 1st day of January, 1902, the capital and surplus of the company amounted to \$285,576.36, and, whereas, since the 1st day of January, 1902, the business of the company has yearly shown a net loss until the 1st day of January, 1906, the above capital and surplus of \$285,576.36 was reduced to \$28,403.43, and, whereas, each of the above dividends as paid or declared by the company were not paid or declared out of the profits of the company, but were paid or declared out of the reserve, capital and surplus, and such declaration was, therefore, void and illegal.

Resolved, that all actions of the board of directors, of the executive committee, or of the officers of the company in declaring such dividends be rescinded, and that the following action be taken relative to the dividends declared or to be declared, on the different policies.

As to ordinary life, limited payment life and endowment policies, editions April, 1898, and January, 1899, the dividends so paid shall be charged against such policies, the insured being notified, and

shall remain a lien thereupon at five per cent per annum until paid, which payment may be made by note, cash or installments with subsequent premiums, provided, however, that where such dividends, or any part thereof, are still standing to the credit of such policies, the same shall be charged back, and their respective holders be notified of same.

As to all other forms of policies, all dividends paid since the 1st day of January, 1902, shall be a lien upon the policy with five per cent interest from the date of the several payments, and shall be deducted in any settlement of the policy.

As to the item of \$31,019.06, or any other dividends declared since the 1st day of January, 1902, and carried on the books of the company as a liability, the same not having been earned and having been improperly declared, as aforesaid, they shall be abrogated and the amount thereof shall be turned over to the profit and loss account of the company.

As to all dividends that have been declared and paid on any form of policy since the 1st day of January, 1906, these dividends shall be a lien upon the policy together with five per cent interest from the several dates of payment, and shall be deducted in any settlement made of the policy.

All interests or dividends heretofore paid, or credited, shall be charged up to date on each policy and then on December 31, 1906, and annually thereafter.

The plaintiff, being of full age, is the holder of its participating twenty-payment life policy No. 7891 for \$5,000 issued on the 14th day of October, 1899, calling for the payment of an annual premium or consideration of \$284.50, which is in full force and effect

He received in dividends the following amounts:

In 1901, the sum of.....	\$57 15
In 1902, the sum of.....	28 50
In 1903, the sum of.....	30 00
In 1904, the sum of.....	31 55
	<hr/>
	\$147 20

In 1905, dividends applicable to the policy and amounting to \$50.60 were declared but not paid.

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Plaintiff demands judgment for the sum of \$50.60 together with costs.

Defendant demands judgment :

1. That plaintiff be deemed to be not entitled to such sum of \$50.60.
2. That the defendant have judgment against plaintiff for the sum of \$147.20, to be charged as a lien on his policy.

George W. Carr, for the plaintiff.

D. Cady Herrick, for the defendant.

SCOTT, J. :

The dividends over which this controversy has arisen may be divided into two classes, those declared and partly paid out of capital, and those declared out of surplus, the payment of which did not, however, impair the capital. The dividend which plaintiff seeks to recover falls within the former class. Nothing is better settled than that dividends should be paid out of surplus and profits, and cannot be lawfully paid out of capital contributed by the shareholders for the purpose of carrying on the company's business and for the protection of its creditors. (2 Thomp. Corp. § 2126; Morawetz Corp. [2d ed.] § 453.)

To pay a dividend otherwise is forbidden by the Penal Code (§ 594), and the Insurance Law (§ 83*) authorizes dividends to policyholders to be paid only out of the surplus of the company. To require the defendant to pay plaintiff the premium declared upon his policy for the year 1905, which, if paid, would necessarily be paid out of capital and not out of surplus, would be to compel the officers of defendant to do an illegal act. Of course, no such judgment can be made. As to the right of the defendant to recover from other policyholders dividends which have been paid them out of capital we cannot now pronounce any judgment as the parties to be affected are not before the court. Concerning the dividends heretofore paid to plaintiff which it is now sought to charge against him as a liability, a different question arises. It does not appear that the payment of these dividends impaired the capital of the

*This section has been amended by Laws of 1906, chap. 326.—[REF.]

company. The only ground of objection to them is that they were not formally declared by the board of directors, or even by the executive committee. Neither the charter nor by-laws provide specifically by whom dividends shall be declared, and in the absence of any specific provision on the subject we suppose that the discretion of determining how much of the surplus and profits earned by the company should be divided among the policyholders, is a matter peculiarly for the board of directors.

Perhaps, if the company refused to pay such a dividend it might have defended a claim for the dividend upon the ground that it had never been declared by competent authority. But having paid it to plaintiff, who, as a policyholder, stood in a position analogous to that of a creditor, without notice of any infirmity in the manner of declaration, we think that the payment must be considered as a voluntary payment by the defendant, and that it may not now be recovered.

The acquiescence of the company in the unauthorized act of its officers implies ratification. If the company could not recover back the dividends, we know of no principle that will permit it to charge them as a liability against the policy to be collected thereafter.

There must be judgment without costs: *First*, that the plaintiff is not entitled to recover from defendant the sum of fifty dollars and sixty cents, declared as a dividend upon his policy in the year 1905, but not paid; and, *second*, that the defendant is not entitled to recover from plaintiff, to be charged as a lien upon his policy, the sum paid him in the years 1901 to 1904, both inclusive, as dividends upon his said policy.

PATTERSON, P. J., INGRAHAM, LAUGHLIN and CLARKE, JJ., concurred.

Judgment ordered as directed in opinion, without costs. Settle order on notice.

HARRY BEST, Respondent, v. THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY, Appellant.

Second Department, March 1, 1907.

**Negligence — injury to pedestrian at railroad crossing — freedom from
contributory negligence — when plaintiff not employee.**

The plaintiff was not a regular employee, but an extra brakeman, receiving compensation for each trip when called for service. The defendant maintained a Young Men's Christian Association, of which the membership was limited to its employees paying dues. The building also contained the train dispatcher's office, and was located across the tracks at the end of Seventy-second street, New York city. In order to reach the building it was necessary to descend a staircase leading down a retaining wall, and to cross the defendant's tracks to the building, this way having been commonly used for thirteen years. The plaintiff having been told that he might be called upon for duty that night, was on his way to the building. The night was dark, but clear. The evidence showed that he crossed a train on the first track, and looked in both directions, and upon taking two or three steps in advance was run down by the defendant's locomotive, which was backing without lights contrary to the company's rules.

Held, that the evidence warranted a finding that the plaintiff was free from contributory negligence;

That, at the time, the plaintiff was not an employee of the defendant in the sense that he assumed the risks of the situation, not being then employed, but going to enjoy the privileges of an association to which he paid dues;

That if the master's negligence be a matter extraneous to the servant's specific employment, or if the injury be received when the servant is not engaged in his duties, the servant occupies the status of a stranger;

That as the association building was maintained by the defendant as a waiting room for those who had relations with the company, and as the approach thereto across the tracks had been maintained for thirteen years to the knowledge of the defendant, and was the only practical method of reaching the building, the plaintiff was not a trespasser, and that it was incumbent upon the defendant to use reasonable care to avoid injury to persons lawfully using such crossing.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 16th day of February, 1906, upon the verdict of a jury for \$17,500, and also from an order entered in said clerk's office on the 16th day of February, 1906, denying the defendant's motion for a new trial made upon the minutes.

John F. Brennan [*Charles C. Paulling* with him on the brief],
for the appellant.

Morgan J. O'Brien [*Abraham Oberstein* with him on the brief],
for the respondent.

WOODWARD, J.:

The plaintiff was about thirty-five or thirty-six years of age. He was injured in an accident upon the defendant's railroad a Seventy-second street and Eleventh avenue under circumstances which the jury has found entitled him to recover damages, which have been fixed at \$17,655.02 by the judgment from which the defendant appealed, as well as from the order denying a new trial. It appears that Seventy-second street comes to an abrupt end at the defendant's tracks at the point of the accident; that the defendant had constructed a building, dedicated to the use of the Young Men's Christian Association and to the defendant's train dispatcher's office, which was located across the tracks from the end of Seventy-second street. This Young Men's Christian Association was limited in its membership to employees of the New York Central and Hudson River Railroad Company, and appears to have been a sort of clubhouse for the accommodation of employees while waiting for trains, the members paying the association for the privileges enjoyed. The plaintiff was not a regular employee; he was an extra brakeman, receiving compensation for each trip made, his time beginning to run from the time that he got on the train, or from the time of his call for the particular service. He had made a trip to Albany, and had returned to New York on a passenger train; had visited the Young Men's Christian Association and had been told that he might be called upon to go out with a train during the night. He went to his home and was returning to the Young Men's Christian Association building at about nine o'clock in the evening. At the point where Seventy second street comes to an end there is a retaining wall, and down this wall is a staircase leading to the defendant's tracks, and this is the way which has been commonly used by the members of the association, and the public generally, in reaching the Young Men's Christian Association building for a period of at least thirteen years. The plaintiff took this common way of reaching the point. He found a train across the first track. He climbed

over this, looked in both directions, and descended to the open space between the next line of tracks, and again looked in both directions. He then stepped forward, and had gone but two or three steps, reaching the next track, when he was run down by one of defendant's locomotives, which was backing down the track without a light, as required by the company's rules. The case was submitted to the jury under a charge to which no exceptions are urged here, resulting in a verdict for the plaintiff.

We are clearly of the opinion that the evidence warranted the jury in finding that the plaintiff had exercised reasonable care in crossing the defendant's tracks. The evidence showed that it was a clear night, but dark; that there was a train on tracks on both sides of the line where the accident happened, thus obscuring the light from an arc lamp near at hand, and that the plaintiff had looked in both directions before proceeding to cross the track. There was no warning given; the locomotive was running backward at the rate of about six miles an hour, without a light, and the plaintiff was not bound to see this locomotive, if he looked, as he says he did, in the direction from which it was coming. There was some evidence of care in approaching this track; the plaintiff looked in both directions, not once, but twice, according to his testimony, which is not contradicted, and from this the jury had a right to hold that he was free from negligence contributing to the accident.

We are equally clear that the plaintiff was not, at the time of the accident, an employee of the defendant, in the sense that he assumed the risks of the situation. He was an extra brakeman, employed for particular trips. He was not going to his work; he was merely returning to the Young Men's Christian Association for the purpose of being on hand if he was called to go out on a trip, and the law is well settled that if the master's negligence is a matter extraneous to his specific employment, or if the injury be received at a time when the servant is not engaged in his duties, then the servant occupies the position or status of a stranger. (*Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, 274.) He was at the time of the accident a stranger to the defendant; he was a member of the Young Men's Christian Association, going there to enjoy the privileges for which he was paying, and he had the same right to be where he was

that any other person would have had who was lawfully seeking entrance to the building.

Nor was the plaintiff a trespasser, as in the case of *Clarke v. N. Y. C. & H. R. R. R. Co.* (104 App. Div. 167). The Young Men's Christian Association building, constructed by the defendant, and which was limited in its membership to employees of the defendant, was in effect maintained by the latter as a waiting room for those who had relations with the company, and the evidence shows that the crossing where the defendant was injured, while not a public highway, had yet been made use of by members of the Young Men's Christian Association and the public for a period of at least thirteen years to the knowledge of the defendant; that it was the only practical method of reaching the building. Under such circumstances it was clearly incumbent upon the defendant to use reasonable care to avoid injury to persons lawfully using such crossing. (*Barry v. N. Y. C. & H. R. R. R. Co.*, 92 N. Y. 289; *Swift v. Staten Island Rapid Transit R. R. Co.*, 123 id. 645, 648, 649, and authorities cited.)

The judgment and order appealed from should be affirmed, with costs.

Present — HIRSCHBERG, P. J., WOODWARD, GAYNOR, RICH and MILLER, JJ.

Judgment and order unanimously affirmed, with costs.

AARON J. COLNON, Appellant, v. DANIEL BUCKLEY, Defendant,
Impleaded with EDWARD V. SLAUSON and DANIEL MURPHY,
Respondents.

Second Department, March 1, 1907.

**Debtor and creditor — judgment creditor's action to set aside conveyance
— dismissal of the complaint sustained.**

In an action by a judgment creditor to obtain a decree that the title to real property is held by a third person as trustee for the creditors of the debtor, it appears that the debtor entered into a contract for the purchase of the property, title to pass at a future day; in the meantime the purchaser to enter into possession and pay a rental. He entered into possession and his license for a

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saloon having been revoked by order of the court, he was unable to pay the consideration for the property in cash and purchase-money mortgage as required by the contract of sale, and the owner at the request of the debtor conveyed the premises to a third person, who paid therefor by purchase-money mortgages, etc. It further appeared that the saloon license was issued to the new purchaser and that the plaintiff's debtor had not paid more than \$250 toward the complete purchase price of \$7,250. It also appeared that the grantee had conveyed the premises to parties who had guaranteed the payment of the purchase-money mortgage given by him and who had advanced \$600 of the purchase price.

On all the evidence,

Held, that a dismissal of the complaint upon the merits was justified, as the plaintiff had not made out a case for equitable relief;

That the plaintiff was not entitled to have the conveyance set aside under section 74 of the Real Property Law providing that a grant of property to one person, the consideration to be paid by another, is presumed to be fraudulent as against the creditors of the person paying the consideration, for under the circumstances the evidence disproved fraudulent intent.

APPEAL by the plaintiff, Aaron J. Colnon, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 4th day of January, 1906, upon the decision of the court, rendered after a trial at the Kings County Special Term, dismissing the complaint upon the merits.

William H. Ford, for the appellant.

Victor E. Whitlock, for the respondents.

WOODWARD, J.:

The plaintiff, a judgment creditor of the defendant Buckley, brings this action and asks to have it adjudged that certain real property, the title of which is now in the defendant Slauson, is held by him as trustee for the creditors of Buckley, and to set aside as fraudulent a deed of said premises to Slauson by the defendant Murphy. When we get at the facts of this case, apart from the law as discussed by the plaintiff, the question presented does not seem doubtful; there is no case for equitable relief, and the judgment dismissing the complaint should be sustained.

On the 19th day of February, 1902, the defendant Buckley entered into a contract with one Schwartje for the purchase of the premises involved in this action, at that time paying \$100. Title was to pass on the 15th day of March, 1903, and in the meantime

Buckley was to enter into possession of the premises at a rental of \$83 per month, with an understanding, never made a part of the written contract, that the rentals should be applied upon the payments to be made under the contract. By the terms of the contract there was to be a payment of \$100 on the signing of the same; \$2,650 in cash on the delivery of the deed, and \$4,500 by the giving of a purchase-money mortgage, making the price to be paid \$7,250. Buckley, who desired the premises for the purposes of a saloon, entered into possession under his lease, and during the first year his license was revoked by order of the court, and he was indebted to various persons in considerable amounts, and was unable to complete his purchase at the time agreed upon. On the 17th day of June, 1903, Schwartje, at the request of Buckley, conveyed the premises to the defendant Murphy, the payments being made as follows: A mortgage for \$5,000 was made to the Kings County Savings Institution; a second mortgage, of the nature of a purchase-money mortgage, was taken by Schwartje, and a third mortgage was given to the defendant Slauson, who at that time advanced \$600 in behalf of the Federal Brewing Company. These bonds and mortgages were given by the defendant Murphy, but it appears from the evidence, and is found by the court, that Murphy was the agent of Buckley in these various transactions. But the new license for the premises was issued to Murphy, who was employed at a salary of \$10 to \$12 per month, and the Federal Brewing Company sold beer to him, or to Buckley, until there was an indebtedness of about \$2,900, and a further mortgage was given to secure this indebtedness, so that there was in all \$10,000 of liens against this property, sold to Buckley at \$7,250, and the evidence showed that Buckley had, in fact, paid only about \$250 toward the purchase, except as the payments were made by the mortgages above mentioned, so it will be seen how frail is the contention of the plaintiff that the various parties to this transaction were engaged in a fraudulent effort to defeat, delay and defraud the creditors of Buckley.

Murphy, after being in possession for some time, transferred the title of the premises to Slauson, representing the Federal Brewing Company, which had guaranteed the payment of the purchase-money mortgage, in addition to advancing \$600 of the purchase money, and the plaintiff claims to be entitled to reach the premises

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under the provisions of section 74 of the Real Property Law (Laws of 1896, chap. 547), which provides that a "grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands." That is, if a man who pays the consideration has the property conveyed to a third person; the law presumes it fraudulent as against then existing creditors, unless the contrary is proved, but in the case at bar the evidence disproves fraudulent intent, by establishing that the title was taken by Murphy as a trustee or agent for Buckley, and the outstanding obligations, in the name of Murphy, were all given either to secure money for the payment of the purchase price or for goods and supplies intended for the benefit of Buckley and to enable him to make the payments necessary to improve his own ability to pay his debts. There was certainly no fraudulent intent on the part of the Kings County Savings Institution in advancing \$5,000; there was no such intent in the \$1,500 mortgage given to secure purchase money, nor yet in the \$600 advanced by the Federal Brewing Company to complete the purchase. The defendant Buckley did not pay the consideration to vest property in the hands of a third person to place it out of the reach of his creditors; he did not pay the purchase price at all, except to the extent of \$250 more or less, the balance being borrowed strictly upon the security afforded by the property, and the equities vested in Buckley, the legal title being in Murphy, who was the holder of the license and the nominal proprietor of the saloon.

The evidence discloses a legitimate business transaction, in so far as Murphy and Slauson are concerned, and as the evidence shows valid liens of \$10,000, and there is no evidence whatever to show any equities above that sum, the plaintiff has clearly failed to establish any rights to equitable relief in this action, and it was admitted upon the trial that all the evidence of the plaintiff was in the same general direction as that which had been adduced up to the close of the trial, so that it is idle to contend that the trial court prevented the plaintiff from fully developing his case. This is not a case

coming within the letter or the spirit of the statute, and as Buckley has all of the equities in the premises, and these are not sufficient to pay the liens already existing against it, there is nothing which the plaintiff could reach, and in the absence of fraud, which is not established by the evidence, or by any evidence which was offered, there is no ground for a reversal of this judgment.

The judgment appealed from should be affirmed, with costs.

HIRSCHBERG, P. J., GAYNOR, RICH and MILLER, JJ., concurred.

Judgment affirmed, with costs.

LOUIS A. HEITZ, Appellant, v. YONKERS RAILROAD COMPANY,
Respondent.

Second Department, March 1, 1907.

**Negligence — collision between trolley car and wagon — erroneous
nonsuit.**

The plaintiff was injured by a collision between his wagon and the defendant's trolley car, while turning across the track into a side street. He testified that before he attempted to cross he looked in both directions and could see no car for a distance of from 500 to 600 feet, which was the limit of vision in the direction from which the car came. His horses were walking slowly, and the defendant's car came over the brow of a hill and struck the rear wheel of the wagon.

Held, that it was error to dismiss the complaint on the theory that the car must have been visible when the plaintiff attempted to cross the track, as a car going forty miles an hour could reach the plaintiff's wagon within the time taken to cross;

That the plaintiff was not guilty of contributory negligence as a matter of law in attempting to cross when he saw no car approaching within 500 feet.

APPEAL by the plaintiff, Louis A. Heitz, from a judgment of the County Court of Westchester county, entered in the office of the clerk of the county of Westchester on the 30th day of June, 1906, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case, and also from an order entered in said clerk's office on the 5th day of July, 1906, denying the plaintiff's motion for a new trial made upon the minutes.

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Sydney A. Syme, for the appellant.

Bayard H. Ames [*Walter Henry Wool* and *James L. Quackenbush* with him on the brief], for the respondent.

MILLER, J. :

Plaintiff appeals from a judgment dismissing his complaint on the merits, entered on a nonsuit granted at the close of the plaintiff's evidence, and from an order denying a motion for a new trial. The action is for negligence which is claimed to have caused a collision between one of the defendant's trolley cars and the wagon in which the plaintiff was riding, at the intersection of Cassilis avenue and Tuckahoe road, in the city of Yonkers. The plaintiff testified that he was driving north on Cassilis avenue, intending to turn east on the Tuckahoe road after crossing the defendant's track, which he had to cross, as it was on the south side of the road; that when his horses' heads were from ten to fifteen feet from the track he looked east and then west; that no car was in sight coming from either direction; that his horses were walking slowly; that seeing no car in sight and hearing no signal, he allowed his horses to cross the track, and that as the rear wheels were between the two rails the collision occurred; that he had an unobstructed view of about 200 yards in the direction from which the car came. It appears that a car could only be seen for a distance estimated at 200 yards from Cassilis avenue because of the grade of the street and a curve. A witness who was standing in Tuckahoe road near its intersection with Cassilis avenue, waiting to take the car, testified that he saw the plaintiff put his head out of the covered wagon, apparently looking to the east just before driving upon the track; that he could not see whether the plaintiff looked in the opposite direction because of the cover to the wagon; that the witness saw the car coming over the brow of the hill just as or before the plaintiff drove upon the track, and that without any signal or slackening of speed the car crashed into the rear of the wagon. This version of the transaction is corroborated by the testimony of another witness. The learned county judge dismissed the complaint because he did not believe that the car could go 600 feet while the plaintiff was going 10, and the respondent seeks to sustain the judgment on the theory that the plaintiff's story is incredible. It does not appear

how fast the car was going or how slow the plaintiff's horses were traveling, except as it may be inferred. The distances given are mere estimates. Two witnesses testified positively that the car did not come in sight until just as the plaintiff was about to drive upon the track, and we discover nothing in the evidence to show that this testimony was false. Suppose the distance from the brow of the hill to the point of collision was 500 feet, the estimate is from 500 to 600, a car going at the rate of forty miles an hour would traverse the distance while the horses were going 25 feet, at two miles an hour and that must have been the distance traveled by them if their heads were from 10 to 15 feet from the track when the plaintiff looked. Surely the plaintiff could not be held to be guilty of contributory negligence as a matter of law for attempting to cross the defendant's tracks at a street intersection if when 10 or 15 feet from the track he could see that no car was approaching within a distance of 500 feet, and the respondent does not claim that he could. We are required on this review to adopt the inferences most favorable to the plaintiff and we must not overlook the important fact that the rights of the parties were equal. This is not a steam railroad crossing case like *Nelson v. Long Island R. R. Co.* (109 App. Div. 626), and in that case we sustained a verdict for the plaintiff. We do not think the credibility of the plaintiff and his two witnesses can be disposed of as a matter of law.

The judgment and order must, therefore, be reversed and a new trial ordered, costs to abide the event.

HIRSCHBERG, P. J., WOODWARD, JENKS and HOOKER, JJ., concurred.

Judgment and order of the County Court of Westchester county reversed and new trial ordered, costs to abide the event.

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JULIA A. OUVRIER, Respondent, v. ELIZABETH MAHON and Others,
Defendants.

GITTLE KURTZ, Purchaser, Appellant.

Second Department, March 1, 1907.

Vendor and purchaser — when title marketable — presumption of payment of mortgage after twenty years.

After a mortgage debt has been due twenty years, there is a conclusive presumption of payment in the absence of proof of part payment within that period, and such presumption may be invoked where the marketability of the title is in question.

Hence, a purchaser on partition sale will be compelled to take title although the lands are covered by five mortgages unsatisfied of record, if all were due more than twenty years before date of sale and there is no proof of any payment of principal or interest within that period.

APPEAL by Gittle Kurtz from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 4th day of December, 1906.

F. J. Moissen [*George Gru* with him on the brief], for the appellant.

J. Hampden Dougherty [*George F. Murray* with him on the brief], for the respondent.

MILLER, J. :

This is an appeal from an order denying the motion of the petitioner to be relieved of her purchase on a partition sale. The petitioner objected to the title because of five mortgages appearing unsatisfied of record. Said mortgages were all due more than twenty years before the date of sale and there is no proof of any payment of principal or interest within said period. It appears undisputed that the mortgagor and his successors were continuously in possession of the premises, and affidavits were submitted in opposition to the motion tending to show that the mortgages were not valid liens upon the property at the time of the sale.

The petitioner relies upon the general rule that a purchaser cannot be compelled to accept anything but a marketable title, but it is well settled that after the mortgage debt has been due twenty years

the presumption of payment becomes conclusive in the absence of proof of a payment within that period, and that such a presumption may be invoked in such a proceeding as this is no longer open to discussion in this State. (*Dunham v. Minard*, 4 Paige, 441; *Knapp v. Crane*, 14 App. Div. 120; *Paget v. Melcher*, 42 id. 76; *Forbes v. Reynard*, 113 id. 306; *Belmont v. O'Brien*, 12 N. Y. 394; *Katz v. Kaiser*, 10 App. Div. 137; *affd.*, 154 N. Y. 294; *Martin v. Stoddard*, 127 id. 61.)

The order should be affirmed.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and RICH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

JOSEPH L. SCHACKTER, Appellant, v. ISAAC KUKOWSKY and MOSES KUKOWSKY, Respondents.

Second Department, March 8, 1907.

Evidence—when evidence of payment inadmissible—checks not connected with transaction incompetent to show payment.

Payment is an affirmative defense and must be pleaded. Even if pleaded, payment cannot be established by putting in evidence the defendants' checks given prior to the transaction in controversy and unconnected therewith by any evidence, and a judgment based upon such erroneous evidence will be reversed.

APPEAL by the plaintiff, Joseph L. Schackter from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendants, dismissing the complaint upon the merits.

Andrew Byrne [*Philip E. Reville* with him on the brief], for the appellant.

Morrison & Schiff, for the respondents.

HIRSCHBERG, P. J.:

The action was brought to recover a balance of \$229.10 alleged to be due for goods sold by the plaintiff to the defendants at the city of New York and delivered in Florida, or to carriers at New

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York, designated by the defendants. It seems to have been practically undisputed that the plaintiff sold the defendants goods to the amount of \$979.10 on two days in the month of August, 1904, and that they were paid for by checks to the amount of \$750, leaving the balance claimed. These checks were all put in evidence by the defendants and are all dated after the receipt of the goods. The defendants, however, were permitted to put in evidence, against the plaintiff's objection, a check for \$110 which was dated prior to the sale of the goods in question, which check the plaintiff testified was given in payment of a bill of goods sold to the defendants in June, 1904. The defendants were also permitted to put in evidence a check for \$277.50, dated prior to the receipt of the goods in question, which was received in evidence subject to a similar objection. The plaintiff testified that this check was given in payment of a bill of goods of that amount sold to the defendants in July, 1904, and not for any of the goods in question, while the defendants admitted the receipt and acceptance by them of a bill for such goods, dated July 15, 1904, for the exact amount of the check.

The judgment appealed from dismisses the complaint on the merits, and if it was rendered on the theory of payment, the receipt of the two checks in evidence, that is, the one for \$277.50 and the one for \$110, clearly constitutes reversible error. The return does not show that the defendants made any answer to the complaint. Payment is an affirmative defense and must be pleaded. Even had payment been pleaded by the defendants, the evidence referred to, would not suffice to establish the defense unless the checks were connected in some way with the sales which were the subject of the controversy. An otherwise concededly good cause of action could not be judicially destroyed in the absence of both defense and proof. The proof, as it appears in the present record, preponderates in favor of the theory that the two checks referred to were not connected in any way with the transaction which forms the subject of the action.

The judgment should be reversed.

WOODWARD, GAYNOR, RICH and MILLER, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

ARCHIBALD C. SHENSTONE, Appellant, v. JOSEPH WILSON,
Respondent.

Second Department, March 8, 1907.

Practice — when service of complaint after defendant's default should not be required — default should be opened only on terms.

Action was commenced by personal service of summons and the defendant neither appeared nor answered until more than two months after the time to answer had expired, when he served notice of appearance demanding a copy of the complaint. Service of the complaint was refused, but notice of appearance was retained by the plaintiff's attorney. The neglect to appear and answer was not excused.

Held, that it was error to dismiss the action, with costs, unless the complaint be served within five days;

That if the order requiring the service of the complaint were regarded as an opening of the default, the defendant was required to excuse the same, and in any event the relief could only be granted on terms.

APPEAL by the plaintiff, Archibald C. Shenstone, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 20th day of November, 1906, as amended by an order entered in said clerk's office on the 22d day of November, 1906.

Archibald C. Shenstone and *William H. Harding, Jr.*, for the appellant.

Edward Kaufmann, for the respondent.

HIRSCHBERG, P. J. :

I think the order appealed from is reviewable and that it was improperly granted. The action was commenced by personal service of the summons on the defendant in the month of June, 1906, and the time to answer expired on July 11, 1906. More than two months after the time to answer had expired, viz., on September 17, 1906, the defendant caused a notice of appearance to be served by his attorneys on the plaintiff's attorneys. In this notice of appearance a demand for a copy of the complaint was included. The copy was not served, however, as the defendant was concededly in default, but the notice of appearance was retained by the plain-

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tiff's attorneys on the theory that a defendant could appear in an action at any stage and that such appearance would entitle his attorneys to notice of all subsequent proceedings. On this state of facts the defendant's attorneys moved for an order requiring a service of the complaint upon them within five days, and in default thereof that the action be dismissed, with costs. The motion was granted and the order appealed from requires a service of the complaint on the defendant's attorneys within five days, with ten dollars costs to the defendant to abide the action, and in default of such service that the action be dismissed, with costs.

The papers on appeal do not disclose the nature of the cause of action. There is nothing in the record to indicate that the defendant has any defense to the cause of action, whatever it may be, or that he failed to appear within the time required by the Code of Civil Procedure, in consequence of any oversight, inadvertence or excusable neglect. If the order appealed from is to be regarded as in effect one opening a default, merits and some excuse would needs be shown, and the favor, if granted, should be on terms imposed on the delinquent litigant, and not on the one who was wholly blameless.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with costs, but without prejudice to the right of the defendant to make a timely motion to open his default on proper papers.

JENKS, HOOKER, GAYNOR and RICH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with costs, but without prejudice to the right of the defendant to make a timely motion to open his default on proper papers.

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JOHN R. HEGEMAN, Appellant, v. STEARNS REALTY COMPANY,
Respondent.

Second Department, March 8, 1907.

**Infant — proceeding to sell real property — order of reference essential —
vendor and purchaser — unmarketable title.**

A proceeding to sell an infant's real property being in derogation of the common law must strictly comply with the statute. If in such proceeding there was no order of reference, the proceeding is absolutely void.

Although the record of such proceeding shows the confirmation of the report of a referee, the proceeding is invalid where the attorney who conducted it testifies that although he prepared an order of reference, it was never signed by a judge. A title acquired upon such sale is not marketable.

HIRSCHBERG, P. J., and HOOKER, J., dissented.

APPEAL by the plaintiff, John R. Hegeman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 2d day of August, 1906, upon the decision of the court, rendered after a trial at the Westchester Special Term, dismissing the complaint upon the merits.

C. N. Bovee [*Frederick C. Lawyer* with him on the brief], for the appellant.

Harold Swain [*Norman Wilmer Chandler* with him on the brief], for the respondent.

MILLER, J. :

The action is brought to recover money paid on account of the purchase price of real property contracted to be conveyed to the plaintiff's assignor. It is based on an alleged defective title. The defendant's title depends upon the validity of proceedings to sell an infant's real property pursuant to section 2348 *et seq.* of the Code of Civil Procedure. The defect alleged is the absence of the order of reference required by section 2354. The papers in said proceeding on file in the county clerk's office are the petition of the guardian of the infant, who was under the age of fourteen, the consent and order appointing the special guardian, the undertaking of said guardian, the report of a referee, the order of the Supreme Court

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confirming the report and directing a conveyance, an agreement to convey, an order of the court confirming said agreement and directing a conveyance, the report of the special guardian and the order confirming it. The petition alleged that a sale was necessary in order to save a sale of the property to satisfy liens and that the infant's interest was worth only \$100, and that was the amount realized. The final order in the proceeding was granted October 13, 1902. The deed was delivered by the special guardian on the 9th day of October, 1902, and on the same day the grantee borrowed \$3,000, in addition to the incumbrances then on the property, from the mortgagee who was claimed to have been threatening foreclosure. The report of the referee and the order confirming it recite the appointment of the referee. The deputy county clerk testified that there was no order of reference in the clerk's office and no record of the entry of such order. The attorney for the petitioner in said proceeding testified: "I prepared a paper which would have been an order of reference had it been entered, and gave it to Mr. Lockwood (the latter was the referee); * * * I never saw that paper signed by a judge of the Supreme Court." We need spend no time on the proposition that a proceeding in derogation of the common law to sell an infant's real property depends for its validity on a strict compliance with the terms of the statute authorizing it. If there was no order of reference the proceeding was absolutely void and the proof on that point is the only question now involved. The respondent urges that the recitals in the order confirming the report of the referee furnished presumptive evidence in proof of the order. I do not think we need to determine now to what extent such presumption could be indulged or whether the burden was upon the defendant to show compliance with the statute, because it seems to me that whatever probative force the recitals may be entitled to is overcome by the testimony of the attorney who had charge of the matter; and the only fair inference from his testimony is that he never made application to the court for the order of reference. He tells what he did; that was to prepare a paper and hand it to the alleged referee. It would not have been proper for him to have suggested to the court the referee to be appointed, much less could he prepare a proposed order and leave it to the referee named therein to have himself appointed. The referee evidently assumed

that the paper handed him was in fact an order granted by the court, and that accounts for the fact that no such order is found in the papers on file.

I think this view makes further consideration of the case unnecessary, and requires the conclusion that the purchaser was not bound to accept the title offered.

The judgment should be reversed.

WOODWARD and JENKS, JJ., concurred ; HIRSCHBERG, P. J., and HOOKER, J., dissented.

Judgment reversed and new trial granted, costs to abide the event.

LEWIS H. POUNDS, Respondent, v. GEORGE W. EGBERT and VIRGINIA L. EGBERT, Appellants.

Second Department, March 8, 1907.

Partnership to deal in lands — Statute of Frauds — contract of partner to convey must be in writing — specific performance refused.

Although a partnership to deal in real estate may be created by parol, if such agreement also provides for the conveyance of real property from one partner to another or to the copartnership, it comes within the Statute of Frauds and is not enforceable if not in writing.

Thus, if an alleged parol agreement for the formation of a partnership to deal in lands further provided that certain lands standing in the name of the wife of one of the partners as trustee for her husband should be conveyed to the other partner upon his paying his share of the purchase price, specific performance of the oral contract is unenforceable whether it were part of the partnership agreement or collateral thereto.

Part payment of a consideration by one of the partners, or work, labor and services in the care, management and improvement of the property are not sufficient for a decree of specific performance, as the remedy at law is adequate.

APPEAL by the defendants, George W. Egbert and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 5th day of June, 1906, upon the decision of the court rendered after a trial at the Kings County Special Term.

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Second Department, March, 1907.

Martin W. Littleton [*Frederick Allis* and *George W. Titcomb* with him on the brief], for the appellants.

Edward M. Bassett [*W. W. Thompson* with him on the brief], for the respondent.

MILLER, J.:

This case is not free from difficulty, because of inconsistencies between the two theories upon which the plaintiff seeks to sustain the judgment. The plaintiff alleges that he entered into copartnership with the defendant George W. Egbert for the purpose of purchasing, developing and selling an unimproved tract of land referred to in the record as the "Ditmas tract;" that the purchase price in excess of the amount raised by mortgage was contributed by said defendant and the title was taken in the name of the defendant Virginia L. Egbert pursuant to an agreement between the plaintiff and said George W. Egbert to the effect that, when the plaintiff had paid him a sufficient sum to make them equal contributors to the purchase price and carrying charges, he would deliver, or cause to be delivered to the plaintiff, a deed of an undivided half of said premises. It is claimed by the plaintiff that said agreement to convey was subsequent and collateral to the agreement creating the partnership. Prior to said alleged copartnership, the plaintiff and one Decker had made a contract to purchase said tract for the sum of \$40,000, and either because they were not able to complete the purchase or because said Decker was then preparing to withdraw from the copartnership then existing between them, an arrangement was made with said defendant, and, passing for the moment what the agreement was, it appears without dispute that said defendant advanced the sum of \$7,500 and obtained the rest of the purchase price by borrowing \$32,500, upon a bond executed by the plaintiff, said defendant and said Decker, secured by a mortgage executed by said Decker and wife, to whom the property was first conveyed; said defendant also conveyed to the plaintiff and said Decker, or to some person for their benefit, premises in which he had an equity of redemption then valued at \$4,000, and thereupon said Ditmas tract was conveyed to the defendant Virginia L. Egbert. The defendant claims that he merely gave the plaintiff and said Decker a bonus of \$4,000 for their contract. The plaintiff claims that at

the request of said defendant he took charge of the premises, leased them to the then occupant for \$60 per year, collected the first year's rent and paid out the sum of \$538.40 for filling and grading. Shortly after said conveyance the plaintiff's partnership with said Decker ended, and a corporation was organized, styled the Manor Realty Company, whose stock, except enough to qualify directors, was owned by the plaintiff and one Lamberton, who had theretofore supplied the capital for the plaintiff's business; said corporation succeeded to said business, and from time to time advanced money to said defendant and received payments from him up to August, 1904, when its books showed a balance in its favor of \$6,738.80. The plaintiff claims that he caused these moneys to be advanced as and for his contribution to the capital of the copartnership. The defendant claims that the money was loaned to him. The plaintiff also claims that he and said defendant each made individual purchases of parcels of land in the vicinity of said tract, not on the partnership account, but in reality for the purpose of benefiting the partnership property by enabling them to control the character of the houses erected in the neighborhood.

The complaint prayed for an accounting and for a decree directing the conveyance to the plaintiff of an undivided half of said premises, which is the relief granted by the judgment appealed from. The defendant Virginia L. Egbert admits that she is a trustee for the true owner, so we need have no difficulty on that head, but may consider the case as though the title stood in the name of the defendant George W. Egbert, and any reference made herein to the defendant will be understood to refer to him. The agreements between the plaintiff and the defendant, whatever they were, were not in writing, and the defendant invokes the Statute of Frauds. It is unnecessary now to discuss the proposition that a partnership for the purpose of dealing in real estate may be created by an oral agreement (*Chester v. Dickerson*, 54 N. Y. 1; *Traphagen v. Burt*, 67 id. 30; *Fairchild v. Fairchild*, 64 id. 471; *King v. Barnes*, 109 id. 267; *Bailey v. Weed*, 36 App. Div. 611; *Burkhardt v. Walsh*, 49 id. 634); but a partnership agreement not within the Statute of Frauds, because by it no estate or interest in lands is created, granted or assigned, must not be confused with such an agreement which does involve the creation, granting or

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assigning of such an estate or interest. The individual partners do not own an estate in the partnership real property; irrespective of where the title happens to be, such property, until the needs of the copartnership are satisfied, is treated as personal property. An agreement to form a copartnership to deal in lands does not, therefore, involve any element violative of the Statute of Frauds; but if such agreement also provides for a conveyance of real property from one partner to another or to the copartnership, it then provides for the creation of an estate or interest in lands and comes directly within the Statute of Frauds. The ground upon which partnership agreements to deal in land have been sustained, as well as the plain words of the statute, requires the conclusion that the mere fact that an agreement happens to provide for a copartnership will not save it from the Statute of Frauds if it also attempts to create, grant or assign an estate or interest in lands. The judgment appealed from does not adjudge that the premises in dispute are partnership property; on the contrary, it decrees specific performance of an agreement to convey land, and as incidental to that relief directs an accounting to ascertain the contributions of each. Whether the agreement to convey an undivided half interest in the property to the plaintiff was a part of the alleged copartnership agreement (and the two are inconsistent), or was subsequent and collateral thereto, as claimed by the plaintiff, it must bear the test applicable to agreements for the sale of land, or the judgment in its present form cannot be sustained.

The plaintiff claims that there has been such part performance by him as will enable equity to decree specific performance under the head of fraud. After carefully examining all of the cases cited by the respondent, and many others, I am unable to find any ground supported by authority for the exercise of such jurisdiction in this case. In the case of *Traphagen v. Burt* (*supra*) one partner without the knowledge of the other, and in violation of his agreement, took title in his own name; subsequently the parties adjusted their differences by an agreement which the judgment carried out. In addition to the fact that the court found in that case that the plaintiff had been induced to put himself in a situation which would have enabled the defendant to perpetrate a fraud on him if the agreement was not carried out, there was also a clear

case of resulting trust. The case of *Sanger v. French* (157 N. Y. 213) did not deal at all with an agreement to convey land. In none of the other cases cited by the respondent was the question of the specific performance of an oral agreement to convey land involved. The principles applicable to such a case were stated by Judge EARL in *Miller v. Ball* (64 N. Y. 286) and *Wheeler v. Reynolds* (66 id. 227), to wit: That equity grants relief under the head of fraud, and that the acts of part performance should be so clear, certain and definite in their object and design as to refer exclusively to a complete and perfect agreement of which they are a part execution.

The purchase of the neighboring property by the plaintiff individually was in no sense an act of part performance; it was an independent transaction. The court found that the plaintiff took charge of the premises and performed work, labor and services in the care, management and improvement thereof; but for the services rendered and money expended at the request of the defendant he has a perfect remedy at law. Manifestly the plaintiff did not have possession of the property, because the defendant sold lots, borrowed money on mortgage and built houses on the property, apparently with little reference to the plaintiff. While the parties appear to have treated the plaintiff and the Manor Realty Company as identical, upon the present state of the proof said company could maintain an action against the defendant to recover the balance in its favor as shown by its books; but even if these advances are treated as part payments made by the plaintiff, he is in no better position, because it is settled that a payment of the consideration even in full is not of itself sufficient to justify a court of equity in decreeing specific performance (*Cooley v. Lobdell*, 153 N. Y. 596); nor is the rendition of services. (*Russell v. Briggs*, 165 id. 500.) In *Ryan v. Dow* (34 N. Y. 307) the plaintiffs expressly agreed not to find any one but the defendant to bid in the premises for them; this agreement they kept, whereby the defendant obtained the property for a nominal sum; and of course the plaintiffs in part performance of their agreement had put themselves in a situation from which equity alone could relieve them, and but for which relief the defendant would have been able to perpetrate a gross fraud. In *Canda v. Totten* (157 N. Y. 281) the plaintiff not only had paid the purchase price, but had made repairs, paid taxes,

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insurance and interest on mortgages upon the premises, upon the faith of the agreement, and could not recover for all of said matters in an action at law. In the case at bar the plaintiff has done nothing, clearly referable to the contract, for which he cannot be fully compensated in an action at law, and the cases of *Wheeler v. Reynolds*, *Cooley v. Lobdell* and *Russell v. Briggs* (*supra*) are controlling authority in support of the proposition that in such case equity cannot relieve him from the consequences of his failure to observe the statute. If a valid partnership agreement was made, as the plaintiff contends, equity will protect his rights under it, but it cannot under that head decree specific performance of a void contract to convey lands. The court found that a partnership was formed, and before considering the relief to which that finding may entitle the plaintiff, we must examine the evidence upon which it is based, having in mind that the judgment is based on an agreement inconsistent with such relation.

The plaintiff testified: "I talked with him in regard to the price (meaning the defendant), and with regard to his becoming a partner with me in the purchase of that tract of land. * * * I said I would like to have him purchase the tract with me, and he said he would do so." With respect to the subsequent agreement to convey a half interest in the property, he testified: "Q. And after you had established an equality with him as to contributions, what did he say he would do, or see done? A. He would convey to me, or have conveyed to me, a half interest in the property." In order to determine whether a partnership existed, it is quite essential to know the terms of the agreement, and yet all the defendant agreed to do, according to the plaintiff, was to purchase the tract with him and to convey a half interest in the property when he had established an equality as to contributions. The learned counsel for the plaintiff says in his brief that the plaintiff testified to the "conclusion of fact" that a copartnership was formed, and would have testified to the terms of the agreement if asked; but calling men partners does not make them such, and I have scanned the record in vain to find that the plaintiff testified to any such conclusion. The only suggestion of a partnership is the statement of the plaintiff that he talked with the defendant about becoming a partner, but this is followed by a statement of a specific agreement

tending to indicate an understanding that the parties were to be tenants in common. I do not go so far as to say that there is no evidence whatever to sustain a finding of a partnership, but in view of the meager evidence on this point, and of the fact that the judgment rendered is inconsistent with a partnership, and of the further fact that we sit as a court of review, I think it better to grant a new trial than to attempt a modification of the judgment.

JENKS, HOOKER and GAYNOR, JJ., concurred.

Interlocutory judgment reversed and new trial granted, costs to abide the final award of costs.

WILLIAM STURMDORF, Respondent, v. FRANKLIN E. SAUNDERS, Appellant, Impleaded with THOMAS C. SNEDEKER and WILLIAM R. SNEDEKER, Respondents.

Second Department, March 8, 1907.

Contract — Statute of Frauds — when consideration expressed in written instrument cannot be varied by parol.

The rule that the consideration of an executory agreement is always open to explanation by parol evidence must be taken in connection with the equally familiar rule that a written contract complete in itself is deemed to have been intended by the parties to be the sole repository of their stipulations.

Although a written instrument may be attacked by parol evidence showing a want of consideration or a condition of delivery preventing it from taking effect, it is a different matter when it is sought to vary the written stipulations of an enforceable contract, and because a party may show lack of consideration it does not follow that he will be permitted to show that the consideration was less than that stated in the written contract.

Whenever a recital of a consideration in an instrument is merely evidence of a fact, it is subject to explanation, but when it is a substantive part of the contract embraced within the covenant it cannot be contradicted.

Thus, where the defendant guaranteed in writing the collection of a chattel mortgage held by the plaintiff conditioned upon the payment of \$4,500, the defendant when sued upon his guaranty is not entitled to show by parol that at the time of giving the mortgage the sum stated was not owing to the plaintiff.

Cases collated and discussed.

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Second Department, March, 1907.

APPEAL by the defendant, Franklin E. Saunders, from a judgment of the Supreme Court in favor of the plaintiff and the defendants Snedeker, entered in the office of the clerk of the county of Kings on the 13th day of June, 1905, upon the verdict of a jury, rendered by direction of the court after a trial at the Kings County Trial Term, and also from an order entered in said clerk's office on the 15th day of June, 1905, denying the appellant's motion for a new trial made upon the minutes.

L. T. Fetzer, for the appellant.

I. S. Lambert and *William H. Good*, for the respondents.

MILLER, J.:

The plaintiff was the holder of a chattel mortgage conditioned for the payment of the sum of \$4,500, which the mortgage recited was the sum in which the mortgagors were then indebted to the plaintiff. In consideration of the satisfaction of said mortgage the testator of the defendant Saunders gave the plaintiff the written guaranty sued upon, in which he guaranteed the payment of the indebtedness then owing the plaintiff by the said mortgagors, which it was agreed should not exceed the sum of \$3,000. The plaintiff claimed upon the trial that said mortgage indebtedness of \$4,500 had been reduced to the sum of \$2,499.86, which, with interest, was the amount recovered, and he sought to establish the amount due by proving an account stated. The testimony respecting the alleged settlement of the accounts was disputed. At the close of the evidence the defendant moved to dismiss the complaint upon the merits. This motion was denied. The plaintiff then moved for a direction of a verdict, and after some discussion this motion was granted. The defendant did not request the submission of the case to the jury, and cannot now claim that that course should have been followed. (*Dillon v. Cockcroft*, 90 N. Y. 649.)

The defendant sought to show that at the time of giving the chattel mortgage the mortgagors did not owe the plaintiff as much as \$4,500, and the exception to the exclusion of this evidence presents the only question for consideration on this appeal. The appellant's argument is based upon the familiar rule that the consideration of an executory agreement is always open to explanation.

That rule must always be considered in connection with the equally familiar rule that a written contract, complete in itself, is deemed to have been intended by the parties to be the sole repository of their stipulations. The consideration of the mortgage was the actual indebtedness; the agreement as expressed in writing by the parties was that in default of the payment of the sum of \$4,500 by the mortgagors, the plaintiff should have the right to take the mortgaged property. Is it possible in such case to substitute a different covenant for the one expressed in the writing under the guise of inquiring into the consideration? It must seem a work of supererogation to analyze authorities upon this question seventy years after Judge COWEN expressed surprise upon finding the question so far open (see *M'Crea v. Purmort*, 16 Wend. 460, 465), but so many refinements have been indulged in on the subject that a loose application of the points actually decided in some cases may seem to justify the appellant's contention; hence I have deemed it proper to show that adherence to the rule in this case is required by authority.

In *De Mott v. Benson* (4 Edw. Ch. 297) and *Gardner v. Winterson* (17 App. Div. 630) it seems to have been assumed that the debt secured by the mortgage could be shown to have been less than the amount stated in the writing.

In addition to *De Mott v. Benson* (*supra*) the appellant cites *Truscott v. King* (6 N. Y. 147); *Chester v. Bank of Kingston* (16 id. 336); *McKinster v. Babcock* (26 id. 378); *Youngs v. Wilson* (27 id. 351); *Barker v. Bradley* (42 id. 316); *Hebbard v. Haughian* (70 id. 54); *Baird v. Baird* (145 id. 659); *Emmett v. Penoyer* (76 Hun, 551; 151 N. Y. 564). In *Truscott v. King* and *McKinster v. Babcock* (*supra*) the court dealt with the validity of a lien created by judgment and chattel mortgage respectively when attacked by other lienors. One of the opinions reported in *Youngs v. Wilson* (*supra*) contains the following expression: "The real consideration of mortgages or deeds may be shown by parol though different from that expressed in the instrument." That case, however, simply dealt with the validity of a mortgage conditioned to secure liabilities, the amount of which was not expressed. *Barker v. Bradley* (*supra*) dealt with a case in which the writing was given in part performance of a verbal agreement, and of course it was held com-

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petent to prove the verbal agreement. *Hebbard v. Haughian* (*supra*) was an action brought to recover the purchase price agreed to be paid on the transfer of certain letters patent, and it was held that the consideration clause of the deed was open to explanation and variance by parol proof. For earlier cases illustrating the application of the same principle, see *Adams v. Hull* (2 Den. 306); *Wheeler v. Billings* (38 N. Y. 263). In *Baird v. Baird* (*supra*) the court applied the rule that it was competent to show the condition upon which the instrument was delivered, and that the receipt of such evidence did not operate to vary the terms of the instrument, but merely to show the purpose for which it was delivered and the circumstances under which it could have effect. That case was decided upon the same rule that controlled the decision in *Grierson v. Mason* (60 N. Y. 394); *Davis v. Bechstein* (69 id. 440) and *Higgins v. Ridgway* (153 id. 130) and cases cited, and is analogous to the case of *Chester v. Bank of Kingston* (*supra*), which applied the familiar rule permitting proof that an instrument in terms absolute was delivered only as security. *Emmett v. Penoyer* (*supra*) was decided upon the point that the writing was not complete and that the parol proof objected to simply supplied the incomplete term. The Court of Appeals differed from the General Term in that case only upon the construction of the writing and agreed that, assuming the writing to have been complete, the lower court was correct in its application of the principle that the written engagement of the parties could not be changed by parol proof. *Chapin v. Dobson* (78 N. Y. 74) and *Van Brunt v. Day* (81 id. 251) illustrate the application of the rule that agreements collateral to and independent of the written agreement may be shown by parol. The foregoing cases illustrate the situations in which the general rule does not apply, and upon a superficial examination some of them may seem to be controlling in this case; because it may seem that, if proper to defeat the instrument by showing want of consideration or a condition of delivery preventing its taking effect, it ought to be permissible to defeat it in part, and that, if the defendant could show in the case at bar that the mortgagors owed the plaintiff nothing, he ought to have been permitted to show that they only owed a part of the sum stated; but showing that there is no contract at all is a different thing from

varying the stipulations of an enforceable contract, and while that distinction may seem rather refined, it exists, and is made plain by Judge VANN in *Thomas v. Scutt* (127 N. Y. 133). That case is ample authority for the support of the judgment in the case at bar, because, while the facts are not the same, precisely the same principle is involved. In that case the attempt was to show that an absolute bill of sale was intended only as security, and according to the general rule this could have been shown, but the court held that by the express terms of the contract it appeared that the parties had agreed to an absolute sale and to the application of the proceeds of the sale and that, therefore, such express stipulations were not subject to variance by parol proof. The case of *M'Crear v. Purmort* (*supra*) distinguished a receipt from a release, and held that the consideration clause recited in a deed was merely a receipt, *i. e.*, the evidence of a fact, and could be contradicted, and it was pointed out that a release could not be contradicted because it extinguished the debt and was not merely the evidence of such extinguishment. Applying that logic, whenever a recital of consideration in an instrument is merely the evidence of a fact it is subject to explanation, but when it is a substantive part of the contract, embraced within the covenant of one of the parties, it cannot be thus contradicted.

The following cases are in point only as showing the general application of the rule that the covenants of parties as expressed in their written contracts cannot be altered by parol proof: *Van Bokkelen v. Taylor* (62 N. Y. 105); *Wilson v. Deen* (74 id. 531); *Eighan v. Taylor* (98 id. 288); *Corse v. Peck* (102 id. 513); *Engelhorn v. Reitlinger* (122 id. 76); *House v. Walch* (144 id. 418); *Mead v. Dunlevie* (174 id. 108).

In *Ferris v. Hard* (135 N. Y. 354, 363) it was held proper to show the real purpose of a mortgage, but Judge PECKHAM was careful to point out that the evidence in that case did not change the liability of the party signing the mortgage. In *Patchin v. Pierce* (12 Wend. 61) it was held, NELSON, J., writing for the court, that parol proof was not admissible to vary the sum specified in the condition of the mortgage or to show that it exceeded the amount justly due the mortgagee. While that case was decided upon the authority of earlier cases, some of which were subsequently overruled, I do

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not find that it has been questioned as an authority upon the proposition decided by it. In *Coon v. Knap* (8 N. Y. 402) it was held that the rule permitting a receipt to be explained by parol had no application where the receipt was a contract between the parties. In *Kenney v. Aitken* (9 Daly, 500) it was held that a recital in a deed of trust of the indebtedness which it was given to secure could not be contradicted by parol proof. That case was decided upon the authority of *Cooks v. Barker* (49 N. Y. 107), which held that the recital in a bond of the consideration for which it was given was a substantive part of the agreement and not open to explanation or variance by parol. It is difficult, if not impossible, to distinguish those two cases from the case at bar. In *Gerard v. Cowperthwait* (2 Misc. Rep. 371) it was held that it was not competent to show by parol proof any conditions except those stated in the bond upon which the action was brought under the guise of inquiring into the consideration of the instrument. The opinion in that case contains an exhaustive review of the authorities, and its reasoning applies with full force to the case at bar. It was affirmed without opinion (143 N. Y. 637). In *Riley v. Riley* (83 Hun, 398) Mr. Justice BRADLEY discussed the precise question applicable here, and what he said can be adopted as decisive of this case. It was there held that it was not competent under the rule permitting inquiry into the consideration clause of an instrument to enlarge the covenant of the party against whom the evidence was offered. Of course the converse of the proposition must be equally true that by like means the covenant of the party in whose favor the evidence was offered could not be cut down. In *Marsh v. McNair* (99 N. Y. 174) it was held that the rule permitting proof that a conveyance absolute in terms was intended as security only had no application to an instrument containing covenants, and that in such case the admission of the evidence had the effect of changing the agreement of the parties as expressed in the instrument.

While it does not clearly appear, I imagine the defendant in the case at bar wanted to show that the sum stated in the contract was an arbitrary sum, intended to cover the actual indebtedness which had not then been computed, but the mortgage is a complete instrument, and unless the writing be treated merely as evidence of the contract and not as the contract itself, the general rule should be

adhered to, and I think there is less danger of being over-refined in adhering to the rule than in attempting to create exceptions to it.

The judgment and order should be affirmed, with costs.

HIESCHBERG, P. J., JENKS, HOOKER and GAYNOR, JJ., concurred.

Judgment and order affirmed, with costs.

AUGUSTUS H. GROTE, Appellant, v. THE CITY OF NEW YORK,
Respondent.

Second Department, March 1, 1907.

Eminent domain — municipal corporations — taking lands for park purposes in city of New York — interest on award — when recovery barred.

Although section 4 of chapter 522 of the Laws of 1884 allows the owner of lands taken by the city of New York to recover by action the award "with lawful interest" after default in payment thereof, such interest is not a part of the award but is in the nature of damages for default in payment and can only be recovered in an action for an award.

Hence, when the award has been paid and the owner has given a receipt for full payment, no subsequent action lies to recover interest although the owner reserved the right to claims for interest on the award.

APPEAL by the plaintiff, Augustus H. Grote, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 25th day of August, 1906, upon the decision of the court, rendered after a trial at the Kings County Trial Term, a jury having been waived, dismissing the complaint.

Raphael Link, for the appellant.

James D. Bell [*Jerome W. Coombs* and *William B. Ellison* with him on the brief], for the respondent.

JENKS, J.:

The action is to recover interest on an award for the taking of lands for public park purposes by the city of New York under chapter 522 of the Laws of 1884. The awards were confirmed on Decem-

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ber 12, 1888, whereupon title was vested in the defendant. On March 2, 1891, demand was made upon the comptroller for payment. The award had been made to the "Estate of F. Grote." In June, 1897, the plaintiff began a proceeding in the Appellate Division to have it determined that he was entitled to the award. The report of the referee in such proceedings that Mayhoff as assignee of the plaintiff is entitled to the award was confirmed in January, 1903. Accordingly the award was paid to Mayhoff on February 10, 1903, without interest. In March, 1903, Mayhoff reassigned to plaintiff all his remaining right, title and interest in and to the award and to all claims for interest thereon, and in January, 1904, after refusal of payment of his claim the plaintiff began this action. Section 4 of the statute regulating the acquisition of the lands (Laws of 1884, chap. 522) provided that "the said mayor, aldermen and commonalty shall, within four calendar months after the confirmation of the said report, pay to the parties entitled thereto the respective sum or sums so estimated and reported in their favor respectively, and in default thereof said persons or parties respectively, his, her, or their respective heirs, executors, administrators, successors or assigns, may sue for and recover the same with lawful interest from and after demand thereof, and the costs of suit."

Such interest is not a part of the award but in the nature of damages for default in payment. (*Cutter v. Mayor, etc., of N. Y.*, 92 N. Y. 166; *Devlin v. Mayor, etc., of N. Y.*, 131 id. 125; *Matter of City of New York [Montgomery St.]*, 91 App. Div. 532, 534.) In the case last cited, writing for this court, I said: "In *Donnelly v. City of Brooklyn* (121 N. Y. 9) the court say: 'As stated by the learned counsel for the plaintiff, * * * the provisions of the statutes (2 R. S. 364, § 9; § 1211, Code Civ. Pro.) fixing the time for the running of interest upon judgments, are simply declarations of the rule at common law that damages are recoverable as an indemnity for a non-payment of liquidated pecuniary demands at maturity, when they should have been paid. It was held in *Sanders v. L. S. & M. S. R. Co.* (94 N. Y. 641) that interest was recoverable upon such judgments, 'not by virtue of any contract to pay interest, but simply as damages because the defendant was in default in the discharge of its obligation to the plaintiff and wrongfully withheld

money from him.' The same rule in the same language was laid down in *O'Brien v. Young* (95 N. Y. 428). And in *United States v. Sherman* (98 U. S. 565) the court say: 'It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor.' The acceptance of the award is a bar to an action for the damages. (*Cutter v. Mayor, etc., of N. Y., supra.*) In that case the court, per DANFORTH, J., say: "By the terms of this section* damages awarded are directed to be paid by the corporation within four months after confirmation of the report of the commissioners, 'and in case of neglect or default' in so doing, leave is given to the party entitled thereto 'to sue for and recover the same with lawful interest from and after the said application therefor, and the costs of the suit.' No other provision is made for the accruing or running of interest, and it was in no sense incident to or part of the original award. It is given as damages for non-payment or detention of the money awarded, and does not constitute a debt capable of a distinct claim. (*Dixon v. Parkes*, 1 Esp. 110; *Churcher v. Stringer*, 2 B. & Ad. 777.) It could only be recovered with the principal by action. Acceptance, therefore, of the sum awarded in full payment of the principal prevents an action for those damages." (See *Mutter of Hodgman*, 140 N. Y. 421, 428; *Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180.)

The Trial Term found: "*Eleventh.* I do further find and decide that thereafter, on February 10, 1903, at the time of the payment and receipt of the said principal sum of \$12,430.75, it was understood and agreed between the defendant herein and the said Bernard Mayhoff, plaintiff's assignee, that all claims for interest upon the same should be reserved to be determined in a subsequent action to be brought therefor, and that at the time of such payment, in pursuance of said agreement, the defendant inserted in the form of its receipt the following: 'Reserving any and all claims for interest on the above awards,' whereupon the said awards were paid to and received and accepted by the said Mayhoff." The evidence is that upon payment of the award when the clerk in the comptroller's

* See R. L. 1813, chap. 86, § 183.—[REP.]

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office presented a receipt in full payment, plaintiff's attorney objected, and that Mr. Hoag, head of the department, was sent for, and he or the clerk telephoned to the corporation counsel's office, and they, *i. e.*, Mr. Hoag or the clerk and the plaintiff, agreed to add to the receipt: "Reserving any and all claims for interest on the above awards." But in *Cutter v. Mayor, etc., of N. Y. (supra)*, it was held that there was no contract liability of the defendant for interest when the settlement was made, *i. e.*, when the award was paid; that there could not be debt for such interest until judgment, and that then it would become due because allowed as damages. (See, too, *Riley v. Maxwell*, 4 Blatchf. 237.) The point is that acceptance of the principal sum "prevents an action for those damages." (*Cutter v. Mayor, etc., of N. Y. supra*; *Davis v. Harrington*, 160 Mass. 278.) The court further say in *Cutter's Case (supra)*: "If the plaintiff meant to have demanded the interest, she ought not to have received the principal. In the face of that fact, protest against the refusal of the defendant to pay interest is of no importance." And also: "But having settled without action, and actually accepted the money in full payment of the principal, the interest cannot, by any disclaimer or protest on the part of the plaintiffs' testator be made the subject of a distinct claim; nor could she, by any avowed reservation, create a right which had no existence." In *Middaugh v. Elmira* (23 Hun, 79) the plaintiff presented an order on the city treasurer who told the plaintiff he could not pay interest; that it was the custom, however, to make out bills for overdue interest which, if authorized by the common council, he could pay; the plaintiff said if he did not release his claim he would accept the face sum of the order, otherwise he would not, and that they would go to the city attorney. The court held that the plaintiff having received the principal sum was foreclosed from his action for interest. In *Fleetwood v. City of New York* (2 Sandf. 475, cited in *Cutter v. Mayor, etc., of N. Y., supra*) *Post's* case (considered in the same opinion) was distinguished from *Fleetwood's* in that previous to payment the corporation counsel, with the assent of the street commissioner, promised that *Post's* rights under petition should be reserved. The court, after considering the effect of the assent to *Post's* being entitled to recover his money, say (p. 481): "The legal effect of the payment is not impaired by the protests made. When a party pays under

duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right enforced by the adverse party. But where there is no legal compulsion, a party yielding to the assertion of an adverse claim, cannot detract from the force of his concession by saying, I object or I protest, at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim." In *Moore v. Fuller* (47 N. C. [2 Jones Law] 205), the parties argued that the principal of a bond should be paid and the question of interest should be referred to arbitration. The arbitrator awarded interest. Upon refusal of payment suit was brought, but the court decided that the plaintiff had no cause of action as on the bond, saying: "A jury gives the interest in an action on a bond, by the way of damages, for the detention of the principal; that being gone, everything founded on it, must go with it. (*Dixon v. Parkes*, 1 Esp. Rep. 111.) That was an action on a *respondentia* bond. The bond was payable twenty-one days after the arrival of the vessel at Canton, but if not then paid, there was reserved an increase of interest. The ship arrived at Canton, but the bond was not paid for three months after the expiration of the twenty-one days, when the principal and interest up to the twenty-one days was paid, the defendant refusing to pay the increased interest for the three months, for which the action was brought. Lord KENYON ruled 'that the plaintiff could not recover.' 'If he had intended to demand the increased interest he ought not to have received the principal.' The same principle is stated in the cases of *Tillotson v. Preston* (3 Johns. Rep. 229); *Fake v. Eddy* (15 Wend. 76), and in 8 Blackf. Rep. 328."* The reservation of the right to maintain an action for interest in the proceeding to determine the right to the award is of no moment, for it appears that the right of the referee to pass on such question was expressly stricken out of the original order by the Appellate Division, hence the matter could not be litigated in that proceeding. Even if the question was properly before the court there could have been no recovery of such interest after the receipt of the award. (*Davis v. Harrington*, *supra.*) I may say further that

* *Comparet v. Ewing*.—[REF.]

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there is no proof of any authority in the clerk in the comptroller's office or in Mr. Hoag which could in any event bind the defendant.

I recommend affirmance of the judgment, with costs.

HIRSCHBERG, P. J., WOODWARD, HOOKER and MILLER, JJ., concurred.

Judgment affirmed, with costs.

BERNARD GRAVEY, Respondent, v. THE CITY OF NEW YORK,
Appellant.

Second Department, March 1, 1907.

Negligence — municipal corporations — when city liable for damages caused by sewers.

When the destruction or dilapidation of a sewer is the result of ordinary use which ought to have been anticipated and could have been guarded against by occasional examination and cleansing, the omission to make the examination and keep the sewer clear is a neglect of duty which renders the municipality liable for injuries caused thereby.

Thus where the sewer was constructed above ground and there is evidence showing that the injuries to the plaintiff's premises were caused by a break in the sewer by reason of the negligence and carelessness of the defendant in maintaining the sewer, the plaintiff is entitled to recover.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 1st day of May, 1906, upon the decision of the court rendered after a trial at the Kings County Trial Term, a jury having been waived.

James D. Bell and *D. D. Whitney, Jr.* [*William B. Ellison* with them on the brief], for the appellant.

William O. Miles, for the respondent.

JENKS, J.:

The action for negligence was tried at Trial Term without a jury. The court found that the defendant, a municipal corporation, maintained a sewer in front of the plaintiff's premises and adjacent to them, and that owing to the negligence and carelessness of the

defendant in maintaining the sewer and other sewers in connection, water and sewage flowed upon the plaintiff's premises to his damage. It seems that the sewer was constructed above the ground. The plaintiff gave testimony that there was a break in the sewer and that the flooding was in consequence thereof. In *McCarthy v. City of Syracuse* (46 N. Y. 194) the court, per RAPALLO, J., say (pp. 197 and 198): "The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair, is not performed, by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear, is a neglect of duty which renders the city liable. (*Barton v. The City of Syracuse*, 37 Barbour, 292; affirmed, 36 N. Y. 54.)" See, too, *Schumacher v. City of New York* (166 N. Y. 103), where the court, per VANN, J., say (p. 107): "Having provided gutters, culverts and sewers for the surface drainage, it was bound to the use of reasonable diligence to discover and remedy defects therein. (*Barton v. City of Syracuse*, 36 N. Y. 54; *McCarthy v. City of Syracuse*, 46 N. Y. 194; *Hines v. City of Lockport*, 50 N. Y. 236; *Nims v. Mayor, etc., of Troy*, 59 N. Y. 500; *Mayor, etc., of N. Y. v. Furze*, 3 Hill, 612.)" In the absence of all testimony on the part of the city, I think that the evidence suffices to support the judgment. In *Magee v. City of Brooklyn* (18 App. Div. 22), where the sewer discharged its contents upon the lands of the plaintiffs, this court, per CULLEN, J., said (p. 24): "The judgment can also be well supported on the ground upon which it was placed by the court below, that of negligence. The defendant insists that previous to the time of the occurrence of the overflow * * * the sewer and drain had proved adequate to carry away the surface water and sewage. If this be so, the fact that on this occasion the

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sewer overflowed the plaintiffs' land would tend to show that at that time the drain had become in some way defective or obstructed. We think the rule *res ipsa loquitur* applies. The defendant was called upon to explain what was the trouble or difficulty with the sewer on this particular occasion, and that it was not responsible for that difficulty. It wholly failed to give any sufficient explanation upon the subject." The learned corporation counsel relies mainly upon *Jenney v. City of Brooklyn* (120 N. Y. 164). In that case a fire hydrant had been removed and in its place a stream of water gushed out. Upon this proof the plaintiff rested, whereupon the city proved recent construction of the hydrant, by the best known method in use, of new and good materials, and a work well done. The plaintiff offered no rebuttal. The court said that the evidence but permitted a guess that the hydrant had been forced out by the pressure of water rather than by some active power above the surface, and held that the case was barren of evidence to support a finding of negligence. The learned counsel lays stress upon the language of the opinion. But in any event this case did not present the mere feature of flooding the plaintiff's premises by the sewer, but a break in the sewer and a consequent flooding.

I recommend affirmance of the judgment, with costs.

Present — JENKS, HOOKER, GAYNOR and MILLER, JJ.

Judgment unanimously affirmed, with costs.

In the Matter of the Application of PAUL JONES & COMPANY,
Appellant, to Compel the Payment by Their Attorney, FREDERICK
L. GILBERT, Respondent, of Money Received by Him as Such.

Second Department, March 1, 1907.

Attorney and client — summary proceeding to compel attorney to pay over — power of referee — evidence — practice — when finding and conclusions need not be separately stated and numbered.

A reference had in a summary proceeding to compel an attorney to pay over moneys to a client is for the purpose of informing the conscience of the court and the latter may adopt or disregard the report of the referee. The report,

however, is entitled to consideration by reason of the fact that the referee saw and heard the witnesses.

A referee ordered to report the evidence with his opinion is not bound to take irrelevant testimony; *contra*, if he be ordered to take testimony only.

It is not error for such referee to exclude a question put to the respondent on cross-examination asking whether other clients were making claims against him for money collected and not reported. An offense is not proved by proof of another offense, and such proof is not relevant upon the legal doctrine of probabilities. This rule obtains both in civil and criminal cases and in cases involving the tortious withholding of property which may be made the basis of a criminal case.

The exception to the rule exists only when the repetition of the offense negatives the plea of ignorance, or accident, or indicates that the act under investigation was one of a series involving a fraudulent design.

The requirement of section 1022 of the Code of Civil Procedure, that the referee separately state and number the facts found and conclusions of law, does not apply to a summary proceeding to compel an attorney to pay over moneys to his client.

APPEAL by the petitioner, Paul Jones & Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 18th day of December, 1905, confirming the report of a referee, and also from a judgment entered thereon in said clerk's office on the 18th day of December, 1905.

S. S. Myers [*George M. Leventritt* with him on the brief], for the appellant.

George Wallace, for the respondent.

JENKS, J.:

This appeal is from an order confirming a referee's report and from "the judgment in said proceeding." The appellant petitioned that Gilbert, as an attorney in charge of its claims against Minister, be compelled to pay over to it \$142 with interest, or be punished for contempt. The ground of the petition was that Gilbert had collected said sum upon a claim. Upon the hearing the Special Term ordered a reference to Henry A. Monfort, Esq., to take such evidence and testimony as might be offered by the respective parties and to report, with his opinion, upon all questions of fact arising upon said motion, and particularly whether the sum of \$142, or any other sum, was actually paid by said Minister to Gilbert on

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account of Minister's indebtedness to the petitioner. Accordingly the referee reported that the only question litigated before him was whether the sum of \$142, or any other sum, had been actually paid to said Gilbert on account of the indebtedness of Minister to Gilbert, and that, in his opinion, based on the evidence, Minister neither paid said sum, nor any other sum, on account of said indebtedness. The Special Term confirmed the report and dismissed the proceeding, with costs, and thereupon "a judgment" was entered that the proceeding be dismissed and Gilbert have judgment against the petitioner for costs.

The reference was but to inform the conscience of the court, and the court could adopt or disregard the report of the referee. (*Marshall v. Meech*, 51 N. Y. 143; *Muhlenbrinck v. Pooler*, 40 Hun, 526; 1 N. Y. St. Repr. 223.) The report, however, was entitled to the careful consideration of the court, mindful of the fact that the referee saw and heard the witnesses, with all the advantage that is gained from that personal contact. The delivery of a witness and the record of his delivery are two distinct things, and the hearer of evidence has a great advantage over the reader thereof. The temperament, the manner and the method of a witness, as well as his words, are valuable indications as to whether he is positive when he should have doubt, or whether he mistakes or misstates, not to say perverts or prevaricates. I do not intend any peculiar application of these words to the witnesses in this case. A reading of the testimony does not convince me that the Special Term erred in adopting the report of the learned referee. The affiants upon the petition were the attorneys of the petitioner and their employees, or the employees of the petitioner. They deposed as to statements by Minister that he had paid the amount of the claim to Gilbert, and to admissions by Gilbert to that effect and to his promise to settle. The opposing affidavits were made by Gilbert and by Minister. The hearing before the referee consisted in the taking of the evidence of some of the petitioner's affiants and of Gilbert and Minister. The witnesses for the petitioner were Monheimer, a law clerk in the office of the petitioner's attorneys, Lithauer, an associate attorney, and Crain, a traveling salesman of the petitioner. The case of the petitioner rests upon admissions of Minister and of Gilbert. There is proof that Minister had said that he had paid Gilbert on account

of the claim, but there is no direct proof that Gilbert in so many words admitted that he had collected the money from Minister upon that claim. Lithauer does testify that Gilbert, in the presence of Minister, when told of Minister's statement, said to Minister, "Bill, you ought not to have said anything about that;" then, when Lithauer asked for a check, he replied that he would discuss the matter with the witness; that in such discussion he informed the witness "that he would send Paul Jones & Company a check for the sum of one hundred and forty-two dollars, which he had collected from Minister, within ten days;" and Crain testifies that after the claim had been placed in Gilbert's hands, Gilbert asked Crain to ask the clients "to let up" — not to annoy him with letters about the claims, saying, "You know I will pay this all right." Gilbert testifies that when he was asked in March, 1903, by Lithauer if Minister had paid him any money on account of the claim, he answered that he had not; and when Lithauer said that he had understood to the contrary, the witness said that there was a matter of \$142 which he had agreed with Minister to turn over on account of the claim as soon as convenient, which he thought would be within the next ten days, and that he explained the circumstances, asserting that no money had been paid to him by Minister directly. The alleged admissions are denied by Gilbert and by Minister. Much of the details as testified to by the plaintiff's witnesses are reconcilable with the version of Gilbert and Minister, namely, that Minister being asked for money by Gilbert as attorney for the petitioner, requested Gilbert to apply on the claim \$142 then owed by Gilbert to Minister, and that Gilbert said he would do so, and did not keep his promise, but that when Gilbert was proceeded against as for money actually collected, he showed that he did not then owe anything to Minister. Gilbert and Minister, under searching cross-examination, gave the details of the said indebtedness and of its discharge. It was natural enough that Gilbert while thus indebted should have acted as if he intended to thus discharge his debt to Minister by payment on his account to the petitioner, and that those with whom he talked jumped at the conclusion that he had actually collected the money. The testimony that Gilbert said that he would send the client a check for \$142 "which he had collected from Minister" may well be the narrative of the witness as descriptive of the

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money or as his understanding of the statements of Gilbert. In any event, it is not a clear, distinct statement of an admission by Gilbert. The evidence of Crain that Gilbert said to him, "You know I will pay this all right," is that such saying was after the time the claim was put in Gilbert's hands *but not after the incident in regard to the payment*, so that it is entirely consistent with the theory that Gilbert did not wish to be irked by letters of insistence or inquiry, but that he would pay the claim as soon as he collected it.

The appellant insists that the referee erred in a ruling upon the evidence. Gilbert, the attorney, under cross-examination, was asked: "Q. There are other clients of yours, Mr. Gilbert, are there not, who are making claims that you have collected money for which you did not report to them. [Objected to; objection sustained; exception.]" And again he was asked: "Q. I ask you again and request you to ask your attorney not to object to the question. Have not other or another application been made by clients of yours to compel the restitution of money collected by you and not turned over to those clients? [Objected to; objection sustained; exception.]" The referee having been ordered to report the evidence with his opinion, was not bound to take testimony which appeared to him as not relevant to the issue. (2 Rumsey Pr. 364; *Matter of Silvernail*, 45 Hun, 575.) The rule seems otherwise if he had been ordered to take the testimony only. (*Fox v. Moyer*, 54 N. Y. 125.) I think that the learned referee did not err in his ruling. The general rule is that an offense is not proven by proof of another offense, and that such proof is not relevant upon a legal doctrine of probabilities. The principle of the rule obtains in both civil and criminal cases. (Wigmore Ev. § 370.) Moreover, although this is not a criminal proceeding it involves an act of tortious taking which might be the basis of criminal action. In *Regina v. Stephens* (16 Cox Cr. Cas. 395), MANISTY, J., quotes Roscoe's Digest of Evidence (p. 34) as follows: "There are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with the view of inducing the jury to believe that, because the prisoner has committed a crime on

one occasion, he is likely to have committed a similar offense on another; but only by way of anticipation of an obvious defense, such as that the prisoner did the act of which he was accused but innocently and without any guilty knowledge, or that he did not do it because no motive existed in him for the commission of such a crime, or that he did it by mistake." I think this is a clear statement of the principle, and the case is cited in a note to *Wignore* (*supra*). (See, too, *Ross v. Ackerman*, 46 N. Y. 210; *People v. McLaughlin*, 150 id. 365, 386, and authorities cited; *Townsend v. Graves*, 3 Paige, 453; *Coleman v. People*, 55 N. Y. 81; *Stephen Dig. Ev.* [Beers' N. Y. ed.] 69.) The learned counsel for the appellant invokes exceptions to the rule which are not applicable to this case. Proof of repetition of an offense negatives the plea of ignorance or accident which may be ascribed to an isolated act or it may indicate that the act under investigation is one of a series of acts articulated by a fraudulent design. The rule and the exceptions are discussed in detail by WERNER, J., in *People v. Molineux* (168 N. Y. 264). (See, too, *People v. Weaver*, 177 N. Y. 434.) The testimony sought to be drawn out by the question was not relevant in this case because there was no defense that admitted the collection of the money, but there was an absolute denial thereof, while on the other hand there was no assertion other than that Gilbert had received the money and had withheld it. So that there was neither occasion for proof of other isolated acts with reference to third persons to rebut a plea of ignorance or accident or to establish a systematic course of wrongdoing. *Darling v. Klock* (33 App. Div. 270; *affd.*, 165 N. Y. 623); *Beuerlien v. O'Leary* (149 id. 33); *Naugatuck Cutlery Co. v. Babcock* (22 Hun, 481); *Converse v. Sickles* (16 App. Div. 49) and many other cases cited by the learned counsel for the appellant apply in an exception to the general rule, namely, that proof of other offenses are relevant in cases of alleged fraud to establish that intention accompanied the act under investigation. In *Hall v. Naylor* (18 N. Y. 588) the court, per COMSTOCK, J., say: "On the trial of such an issue the *quo animo* of the transaction is the fact to be arrived at, and it is, therefore, competent to show that the party accused was engaged in other similar frauds at or about the same time." The distinction made even in cases of fraud is clearly pointed out by the court, per RAPALLO, J., in *Mayer v.*

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People (80 N. Y. 364, 372): "The mischief to be guarded against in the reception of this testimony was that the jury might consider it in determining the controverted question whether the defendant in fact made the representations charged, to the prosecutor. It would not have been proper to admit it on that issue and it was not so admitted. On the contrary, at the request of the defendant's counsel, the jury was expressly cautioned by the court that the testimony as to representations made to others had no proper relation to the question whether or not those testified to by the prosecutor were made to him, and that it was admitted on the question of intent solely, and the ground upon which it was admitted on that question was very clearly explained to the jury in the charge and they were instructed if they did not believe the representations to others to be part of a general purpose or scheme to obtain goods fraudulently, to disregard them and not to consider them as independent acts or permit them to work a mere prejudice against the accused."

The point that the report of the referee does not state separately the facts found and the conclusions of law as required by section 1022 of the Code is not well made. The statute makes this requirement where the report of a referee is upon a trial of the whole issues of fact, not otherwise. (*Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 158.) In *Lederer v. Lederer* (108 App. Div. 228), cited by the learned counsel for the appellant, the reference was to determine the issues, and in that case it was said: "The purpose of requiring the findings and conclusions of law to be separately stated and designated is, as pointed out in *Jefferson County National Bank v. Dewey* (181 N. Y. 98), to enable the defeated party to take proper exceptions and to enable the court in case an appeal be taken to determine what facts the referee did find and whether they sustained the legal conclusions." I recommend affirmance, with costs.

HOOKEE, GAYNOR, RICH and MILLER, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

EDWARD P. MOSSEIN, as President of LOCAL UNION No. 471 of THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Respondent, v. THE EMPIRE STATE SURETY COMPANY, Appellant.

Second Department, March 1, 1907.

Costs — when plaintiff on second verdict entitled to costs of both trials.

When judgment for the plaintiff is reversed and a new trial granted, with costs to abide the event, and the plaintiff succeeds upon the second trial, he is entitled to tax the costs of both trials. There is a distinction between cases where costs are allowed "to abide the event" or "to the *appellant* to abide the event."

But where the plaintiff, successful on second trial, amends his complaint after the cause is placed on the calendar, he is not entitled to tax a term fee prior to the amendment.

APPEAL by the defendant, The Empire State Surety Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 24th day of April, 1906, denying the defendant's motion for an order retaxing the plaintiff's bill of costs.

F. J. Moissen, for the appellant.

William F. Hagarty [*James T. O'Neill* with him on the brief], for the respondent.

JENKS, J. :

When the plaintiff's first judgment was reversed and a new trial was granted, with costs to abide the event (97 App. Div. 230), and the plaintiff succeeded upon the second trial, he was entitled to tax the costs of both trials. The learned counsel for the appellant argues that in effect the plaintiff thereby profits by a wrong proceeding. The point has been urged before and the force of it recognized, *e. g.*, by FREEDMAN, J., in *Isaacs v. N. Y. Plaster Works* (4 Abb. N. C. 8). But the argument for the rule is that the defendant was not entitled to the costs when he appealed, as he had been defeated, and as a defeated party he demanded a new trial, contending that he was not liable. He gained the new trial, but he was again defeated, and the plaintiff, who had not been awarded costs absolutely, became

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entitled to them as the successful party. On the other hand, the defendant could have saved costs by offer of judgment, but he preferred to litigate, and hence he is charged with the costs of the proceedings finally determined against him. (See opinion of BRADY, J., in *Howell v. Van Siclen*, 8 Hun, 524; *affd.*, 70 N. Y. 595.) I think that the respondent was entitled to tax the costs. (*Howell v. Van Siclen*, *supra*; *First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y.*, 84 N. Y. 469; *Belt v. American Central Ins. Co.*, 33 App. Div. 239; *Loring v. Morrison*, 25 *id.* 139; *Smith v. Smith*, 22 *id.* 319; *Sanders v. Townshend*, 63 How. Pr. 343; *Van Wyck v. Baker*, 11 Hun, 309; Nichols Pr. § 2881; Baylies N. T. & App. [2d ed.] 494.) It is to be noted that the costs were "to abide the event" and not to the appellant to abide the event.

I am of opinion, however, that it was error to tax any term fee in the Trial Term previous to the amendment of the complaint if this was done. For although by the amendment of the complaint in this case the cause of action was not changed, the original issue as on the calendar before the amendment was destroyed by the amendment of the complaint. I find no other errors in the taxation prejudicial to the defendant, for although three items of disbursements of seventy-five cents, eighteen cents and fifty cents are in excess of the proper amounts, yet the plaintiff was entitled to tax such disbursements as of two trials and not one. The order should be modified as indicated, and as thus modified affirmed, without costs to either party.

HOOKE, RICH and MILLER, JJ., concurred.

Order modified as indicated in the opinion of JENKS, J., and as thus modified affirmed, without costs to either party.

PETER J. SULLIVAN, Respondent, v. THE BROOKLYN HEIGHTS
RAILROAD COMPANY, Appellant.

Second Department, March 1, 1907.

**Negligence—injury by stepping upon an electrically charged rail—
erroneous charge.**

In an action to recover damages for injuries received by the plaintiff, who stepped upon an electrically charged rail, when the defendant has given expert testimony that the shock could not be received except under certain conditions which did not exist, it is error for the court to instruct the jury that if the plaintiff received the shock he is entitled to recover, whether the defendant has exonerated itself or not. Such instruction is equivalent to holding that the defendant was an insurer, and that the sole question was whether the accident resulted from the shock.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the County Court of Queens county in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 1st day of June, 1906, upon the verdict of a jury for \$200, and also from an order entered in said clerk's office on the 29th day of May, 1906, denying the defendant's motion for a new trial made upon the minutes.

I. R. Oeland [*George D. Yeomans* with him on the brief], for the appellant.

Herbert N. Warbasse, for the respondent.

JENKS, J.:

The learned court submitted the case to the jury and instructed it that the issue was whether or not the plaintiff received an electrical shock by stepping upon the rail. "If he did receive an electrical shock by stepping upon the rails of this track, and was injured in that manner, he is entitled to recover." At the close of the charge the learned counsel for the respondent said: "I ask your Honor to instruct the jury that if they believe the plaintiff received an electrical shock at the time alleged and in the manner described by the plaintiff, unless they are satisfied that the defendant has exonerated itself, they may bring in a verdict for the plaintiff upon that evidence." The court replied: "Whether the

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defendant has exonerated itself or not, if they believe he received an electrical shock he is entitled to recover." Exception was taken. The learned counsel for the appellant then excepted to that part of the charge wherein the court said that "if the plaintiff received an electrical shock when he stepped on the tracks he is entitled to recover." The court then said: "I will modify that to the extent that if he was injured by an electrical shock which he received by stepping upon the tracks, he is entitled to recover." The defendant then excepted to the charge as given and to the modification.

I think that the exceptions were well taken. The action was for negligence, that is, for a breach of the legal duty to use the care due under the circumstances. The defendant offered evidence described by the learned court in its charge "to the conditions of the track there, and the opinions of their experts as to the impossibility of an electrical shock being transmitted except under certain conditions which must have been present, and which they claim were not present." And yet the court charged, "whether the defendant has exonerated itself or not," if the jury believed that the plaintiff received the shock he was entitled to recover; or, in other words, that the defendant was an insurer, and that the sole question was whether the accident had resulted from the shock. It had not ruled as matter of law that there was no evidence that exonerated or tended to exonerate the defendant, and then but left to the jury as questions of fact the happening of the accident from the cause alleged, and of the damages, but had submitted the entire case, charging as the law that even if the testimony did exonerate the defendant, it was liable.

It is quite true that the doctrine of *res ipsa loquitur* was applicable (*Clarke v. Nassau Electric R. R. Co.*, 9 App. Div. 51), but as we said in that case, per WILLARD BARTLETT, J.: "The doctrine of *res ipsa loquitur* simply calls upon the defendant after proof of the accident to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the non-existence of an adequate explanation or excuse." (See, too, *Ludwig v. Metropolitan St. R. Co.*, 71 App. Div. 210; 174 N. Y. 546.)

The learned counsel for the appellant insists that in any event

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the error was cured or waived in that thereafter the defendant requested the court to charge, and the court in effect charged, "that the plaintiff has got to prove by satisfactory evidence that any injury he received was due to an electrical shock, * * * and that the jury have no right to theorize or speculate, and that the evidence must be positive evidence, and not probable or theorizing evidence." These instructions related to the cause of the injury and the requisite proof thereof, and in no way affected the question which I have discussed. I advise that a new trial be ordered, costs to abide the event.

HOOKE, GAYNOR, RICH and MILLER, JJ., concurred.

Judgment and order of the County Court of Queens county reversed and new trial ordered, costs to abide the event.

ABRAM H. COLE and HARRY A. COLE, Doing Business under the Firm Name and Style of A. H. COLE & SON, Respondents, v. CLARENCE M. MENDENHALL, Appellant.

Second Department, March 8, 1907.

Contract — broker's agreement to release vendor from payment of commissions as consideration for vendee's promise to pay moneys.

When a vendor refuses to sell lands unless a real estate broker who was associated with the vendee in other transactions would waive any claim against the vendor for commissions, the vendee's promise to pay the broker \$100 if he waive his claim to commissions is founded upon a good consideration.

APPEAL by the defendant, Clarence M. Mendenhall, from a judgment of the County Court of Westchester county in favor of the plaintiffs, entered in the office of the clerk of the county of Westchester on the 21st day of February, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

Herbert A. Knox, for the appellant.

Charles A. Van Auken, for the respondents.

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WOODWARD, J. :

The facts, as they have been found by the jury upon sufficient evidence, appear to be as follows: The plaintiffs are engaged in the real estate business in New Rochelle. The defendant went to them looking for a house to rent. During the time that the parties were looking for a suitable house the plaintiffs and defendant discovered a house known as the Haulenbeek house. It bore a sign stating that it was for sale. Defendant asked plaintiffs to make inquiries in reference to the same and some negotiations were undertaken, resulting in the owner of the house offering to accept \$15,000 for the same. Subsequently the defendant rented a place through the efforts of the plaintiffs and then entered into a direct negotiation with Haulenbeek for the purchase of the Haulenbeek house. This resulted in Haulenbeek agreeing to accept \$13,500 for the premises, provided he was not called upon to pay any broker's commissions. The defendant went to the plaintiffs and the latter for a consideration of \$100 agreed not to insist upon any commissions from Haulenbeek, and with this understanding the deal between the defendant and Haulenbeek was consummated. It is not necessary to determine here whether the plaintiffs had any valid claim against Haulenbeek; the latter assumed that there might be a claim against him for commissions and he refused to sell at the terms which the defendant was willing to offer, except on condition that he should be relieved of such claim, and the plaintiffs, having a clear legal right to litigate the question of Haulenbeek's liability to them, relinquished the right upon the promise of the defendant to pay them \$100 and the defendant was thus enabled to carry out his purpose and secure the premises which he desired at \$1,500 less than originally demanded for the same. We are of opinion that there was such a forbearance for the benefit of the defendant on the part of the plaintiffs as to afford a consideration for the promise and that the judgment in favor of the plaintiffs should be supported.

The judgment and order appealed from should be affirmed, with costs.

HIRSCHBERG, P. J., JENKS, HOOKER and MILLER, JJ., concurred.

Judgment and order of the County Court of Westchester county affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH CURREN, JR., Respondent, v. HENRY R. COOK, as Auditor of the Board of Education of the City of New York, and Others, Appellants.

Second Department, March 8, 1907.

Municipal corporations — when clerk of board of education of city of New York not entitled to salary during suspension.

As section 1067 of the charter of Greater New York provides that employees of the board of education may be removed for cause at any time by a three-fourths vote of the board, and may be suspended pending the trial of charges, a clerk in the bureau of supplies of said board who has been properly dismissed from service is not entitled to recover his salary for the period of his suspension pending the trial.

It is the intent of said statute that the dismissal relate back to the time of suspension.

APPEAL by the defendants, Henry R. Cook, as auditor, etc., and others, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Richmond on the 16th day of January, 1907, granting the relator's motion for a peremptory writ of mandamus.

Stephen O'Brien [*Theodore Connolly* and *William B. Ellison* with him on the brief], for the appellants.

John J. Kenney, for the respondent.

WOODWARD, J.:

The relator is a resident of Richmond county and was a clerk in the bureau of school supplies in the board of education of the city of New York and was entitled to a salary of \$1,200 per year. He was concededly within the provisions of section 1067 of the Greater New York charter (Laws of 1901, chap. 466), which provides: "The city superintendent of schools, any associate city superintendent, any district superintendent, the supervisor of lectures, any member of the board of examiners, the secretary of the board of education, the superintendent of school buildings, the superintendent of school supplies, the auditor or auditors, and any other officers, clerks or subordinates of the board, may, any or either of

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them, be removed for cause at any time by a vote of three-fourths of all the members of the board of education, and may be suspended by the board of education pending the trial of charges."

On the 25th day of April, 1906, the relator was suspended as a clerk in the bureau of supplies, without pay, pending the trial of charges that he had been guilty of deceit, falsehood, misconduct and neglect of duty. These charges were subsequently tried, resulting on the tenth day of October in the adoption of a resolution to the effect that "Joseph Curren be and he hereby is, dismissed from the service of the Department of Education." There is no suggestion on the part of the relator that this trial was not properly conducted, or that he was not properly dismissed from the service, but he seeks by a peremptory writ of mandamus to compel the audit and allowance of his claim for salary during the time that he was suspended from service, and the learned Special Term, following the supposed authority of *O'Hara v. City of New York* (46 App. Div. 518), has granted the writ, the respondents appealing from the order.

We are of opinion that the *O'Hara* case is distinguishable. In that case the plaintiff was unlawfully removed from office, and upon a proper proceeding was reinstated, and the court merely held that he was entitled to his compensation during the time that he was unlawfully prevented from discharging his duties. That is unquestionably the law of this State. But in the case now under consideration the relator was not unlawfully removed from office. Charges were preferred against him on the twenty-fifth day of April, and if he was guilty of the things charged against him the board of education had the power to remove him on that day, for the language of the statute is that he may "be removed for cause at any time." To enable the board to properly try and determine the charges and at the same time to protect the public against impositions on the part of vicious or incompetent persons, the Legislature also provided that the officer might "be suspended by the board of education pending the trial of charges," and it would be strange if it was contemplated that a man who was concededly liable to dismissal on the twenty-fifth day of April, because of misconduct in office, should be permitted during the term of his suspension to draw the salary attached to the office, where it

appeared upon the trial that the facts warranted his dismissal at the time of the making of the charges. It seems to us clear that the legislative intent was to permit the suspension of the officer from the time the charges were made, and if the trial demonstrated that the charges were sufficient to justify his removal, that the determination related back to the suspension, and that the relator, being unworthy to hold the position, was not entitled to his compensation.

The cases of *Gregory v. Mayor, etc., of New York* (113 N. Y. 416) and *Emmitt v. Mayor, etc., of New York* (128 id. 117) do not conflict with anything here determined. In those cases the statute did not in terms provide for a suspension, but it was urged that the power to remove carried with it the power to suspend indefinitely without pay, and the court held that under the facts in those cases this was not the law. In the *Gregory Case* (*supra*) the court say: "Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question whether the suspension in the particular case would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence should be indulged in, based only upon the grant of the specific power to remove." Here there is no such question; the statute gives the power of removal at any time, and as an incident to that power it provides that the party may be suspended pending the trial of the charges, and the inference to be drawn is that it was the intention to make the removal at once effective, subject to the result of the trial of charges. At least, in the absence of a controlling authority, this court is not disposed to say that a man who is concededly guilty of the charges preferred against the relator is entitled to his pay during the time that he may be able to avoid a trial, where the statute has provided for his suspension. We do not think the Legislature intended such a result.

The order appealed from should be reversed, with costs.

JENKS, GAYNOR and RICH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements.

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Second Department, March, 1907.

IRVING BROTHERTON, Respondent, v. BARBER ASPHALT PAVING COMPANY, Appellant.

Second Department, March 8, 1907.

Trial — failure to produce witness — right of opponent to comment thereon.

When a physician who treated the plaintiff for injuries complained of and injuries received in a prior accident is not produced upon the trial as a witness, the opposing counsel may call attention to the fact and comment upon it with a view to having the jury infer that the physician was not called because his testimony would not have been favorable to the plaintiff.

It is improper to rule that because the plaintiff was forced to trial the absence of the physician cannot be commented upon, especially where the plaintiff has sought to explain his absence and the jury has had full benefit of the explanation.

APPEAL by the defendant, the Barber Asphalt Paving Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Richmond on the 20th day of March, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

Eugene Lamb Richards, Jr. [*Rutherford B. Meyer* and *Frank Verner Johnson* with him on the brief], for the appellant.

Jacob S. Strahl, for the respondent.

WOODWARD, J.:

We are of the opinion that there must be a reversal in this case. It appears that at the trial the physician who treated the plaintiff for the injuries complained of, and who had treated him for injuries received in a prior accident, was not present as a witness and did not testify. On the cross-examination of the plaintiff he undertook to explain away the absence of his physician, and after stating that he had had another accident from which he was under the doctor's care he continued: "I had no swelling of the leg as the result of that. Hiller was my doctor at that time. He is not here just at present. He is at Portage, I believe. I have not made any efforts to communicate with him about this case to-day. He has been here every day. I expect to see him here to-day. I was here for awhile

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yesterday. This case was answered 'Ready' for me. I was not here present when it was answered. I knew it was marked 'Ready.' I was talking with my doctor yesterday. I told him it would probably be reached by the last of this week. It was on the bottom of the calendar yesterday. That was yesterday I communicated with him. It was just at the noon hour, when you went out to lunch here. I have not seen him since."

When counsel for the defendant summed up, he undertook to comment upon the failure of the plaintiff to produce his physician as a witness, and the following colloquy took place between the court and counsel: "Mr. Richards.—I must be allowed to refer to the absence of this doctor as a very proper thing. The Court.—I am going to hold to the contrary. The case was forced on to trial under circumstances where there was evidently some misunderstanding. I enforced the rule of the court and compelled the plaintiff to go to trial, and I am going to charge the jury that under the circumstances under which this case went to trial, that they must draw no inference one way or the other from the absence of the doctor." To this remark counsel for the defendant excepted.

We think it is a well-established rule of practice that where a witness who bears the relation to a party such as the doctor bore to the plaintiff in this case and such witness was not produced upon a trial, the opposing counsel may call attention to the fact and comment upon it with a view of having the jury infer the witness was not called because his testimony would not have been favorable to the plaintiff's case. This seems the more proper in this particular case because the plaintiff upon his cross-examination (heretofore quoted) had under oath sought to explain such absence and failure to testify, and the jury had the full benefit of that explanation. The statement of the court, as to what occurred before the jury was impaneled and before the case was on trial cannot be substituted for evidence.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

JENKS, GAYNOR and RICH, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

THE BEN FRANKLIN TRANSPORTATION COMPANY, Appellant, v. THE CITY OF YONKERS, Respondent. (No. 1)

Second Department, March 8, 1907.

Watercourses — municipal corporations — duty of city of Yonkers relative to lands beneath the Hudson river — charge approved.

Chapter 562 of the Laws of 1890, granting to the city of Yonkers the fee of lands beneath the Hudson river at the mouth of the Nepperhan stream, which provides that said lands "shall be forever kept unobstructed and free from docks, piers or other structures preventing the use of the same by shipping," does not impose upon the municipality the duty to dredge the said lands for the benefit of private owners, but is intended merely as a limitation upon the grant and prohibits the city from using the lands so as to obstruct navigation. It does not require the municipality to remove from said waters obstructions created by other parties or by the natural action of the waters, and it is not error to so charge in an action against the municipality for alleged injuries sustained by the obstruction of the waters of the Hudson river whereby the plaintiff was prevented from reaching its docks.

APPEAL by the plaintiff, The Ben Franklin Transportation Company, from a judgment of the County Court of Westchester county in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 16th day of July, 1906, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of March, 1906, denying the plaintiff's motion for a new trial made upon the minutes.

James M. Hunt, for the appellant.

Thomas F. Curran, for the respondent.

WOODWARD, J.:

The plaintiff's action is for damages alleged to have been sustained by reason of the defendant's obstructions in the waters of the Hudson river, preventing the plaintiff reaching its docks. The theory of the action is that the defendant, through its construction and maintenance of sewers, and by dumping snow and ice in the Nepperhan stream, which flows through the defendant city and empties into the Hudson river, has caused an obstruction by reason of the settling of the refuse and sewage, which has interfered with

the plaintiff's rights at its docks. The city has, at intervals, dredged out the basin. Some time prior to the bringing of this action the plaintiff complained to the defendant of the alleged obstruction and requested that the same be removed. The defendant did not act in the matter. The plaintiff then undertook the work of dredging upon its own account and presented its bill to the defendant for payment, and the action is in effect to compel the defendant to pay the cost of removing this alleged obstruction. Upon the trial of the action there was a conflict of evidence as to the cause of the obstruction; on the part of the defendant there was evidence that the Nepperhan stream drained a large territory outside of the city of Yonkers, including several villages; that private sewers emptied into the stream; that the plaintiff stabled horses upon the dock and emptied refuse into the basin, and that the sewers which had been constructed and maintained by the city did not discharge into the Nepperhan stream, except in cases of floods, and that then the overflow was of water merely, the sewage having been washed out clean before there could be an overflow, and the sewers discharged directly into the Hudson river, at a point which did not affect the plaintiff. There was some evidence in support of the plaintiff's contention, but the jury has found against it, and in the absence of reversible error, the judgment should not be disturbed.

The plaintiff contends that the court made a fatal error in its charge to the jury. It seems that by the terms of chapter 562 of the Laws of 1899 the city of Yonkers was granted title to the fee of the land under the waters of the Hudson river at the mouth of the Nepperhan stream, and it was provided in section 2 of the act that "the land so granted by this section to the city of Yonkers shall be forever kept unobstructed and free from docks, piers or other structures preventing the use of the same by shipping." The learned court, in its charge to the jury, said: "But I charge here that they (the city) were only obliged to keep it unobstructed from any act of their own." The court was requested to charge, and did charge, the two following requests: "I ask your Honor to charge that there is no liability incurred by this City for the cleansing of the mouth of this stream under the act, chapter 562 of the Laws of 1899," and "I ask you to charge that they are not liable at all under

that act for the cleaning of this basin." There was no exception to the ruling of the court upon these two requests, counsel for the plaintiff contenting himself with the following: "I have no fault to find with your Honor's charge, but in order to raise the legal question I ask permission to except to that part of your charge in which, referring to the act of 1899, you said that the City would only be liable to maintain this slip, or this property described in the act, unobstructed from any act of their own, and not from any act of others."

This exception relates purely to the duty of the defendant under the act of 1899, and we are clearly of opinion that the language of the act does not contemplate imposing a duty upon the municipality to dredge this slip for the benefit of private parties, but was intended merely as a limitation upon the grant, that the city should not use the lands for the purposes of docks, piers or other structures tending to obstruct navigation. The duty might go to the extent of requiring the municipality to keep the lands free from obstructions of its own creating other than docks, piers, etc., but it cannot be fairly construed to require the defendant to remove obstructions which are created by others, or by the natural action of the waters of the Nepperhan stream, and the charge does not seem to be open to criticism.

We are of opinion that the verdict was not against the weight of evidence as to the cause of the obstruction complained of, and we discover no reason for disturbing the result reached.

The judgment and order appealed from should be affirmed, with costs.

HIRSCHBERG, P. J., GAYNOR, RICH and MILLER, JJ., concurred.

Judgment and order of the County Court of Westchester county unanimously affirmed, with costs.

In the Matter of the Appraisal of the Estate of ABRAM R. STRANG, Deceased, under the Act in Relation to Taxable Transfers of Property.

WILLIAM C. WILSON, as Comptroller of the State of New York, Appellant; ARTHUR HORTON, as Trustee of the Estate of ABRAM R. STRANG, Deceased, and Others, Respondents.

Second Department, March 8, 1907.

Tax—Statute of Limitations — statute does not run on liability of executors and beneficiaries for inheritance tax.

The provisions of sections 1 and 9 of chapter 713 of the Laws of 1887, holding administrators, executors, etc., liable for a transfer tax until the same is paid are in the nature of a penalty imposed for failing to discharge the duty commanded by law.

Whether or no a proceeding to collect a transfer tax is barred by subdivision 2 of section 882 of the Code of Civil Procedure after the expiration of six years (which does not seem to be the case) the collection of such tax is removed from the operation of the Statute of Limitations by chapter 737 of the Laws of 1899, providing that the provisions of the Code of Civil Procedure relative to limitations shall not apply to proceedings to levy, collect, etc., any taxes or penalty prescribed by articles 9 or 10 of chapter 908 of the Laws of 1896.

The act aforesaid is retroactive and intends to relieve proceedings under the Inheritance Tax Law from the bar of the statute, except as to innocent purchasers of real estate who are relieved from the lien created by the statute after the expiration of six years. But this exception does not apply to executors, administrators, trustees or beneficiaries. Representatives have no right to permit property on which the State has a lien for taxes to pass out of their possession or control until the lien has been discharged, and the property comes into the possession of the beneficiaries subject to that lien, and hence the Legislature has power to remove the bar of the Statute of Limitations in such cases.

APPEAL by William C. Wilson, as Comptroller of the State of New York, from a decree of the Surrogate's Court of the county of Westchester, entered in said Surrogate's Court on the 8th day of December, 1906, reversing an order entered in said court on the 30th day of April, 1906, assessing a tax upon the property of Abram R. Strang, deceased.

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Second Department, March, 1907.

Frank M. Buck, for the appellant.*Eben A. Wood* and *Walter H. Dodd*, for the respondents.

WOODWARD, J. :

Abram R. Strang, a resident of Westchester county, died in January, 1888, leaving a last will and testament, disposing of real estate and personal property of the aggregate value of \$21,832.50. The property was disposed of in such a manner as to bring it within the terms of chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885, and a tax of \$517.15 was levied and assessed under the provisions of section 2 of the act cited, which provides that "the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, * * * and, together with the interest thereon, shall be and remain a lien on said property until the same is paid." Section 1 of the same act provides likewise that "all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed," and section 9 of the act provides that it shall be the duty of executors, administrators or trustees of an estate within the terms of the act to report in writing to the treasurer or comptroller of the county within six months of assuming office or within such further time as therein prescribed, so that the provision for holding such administrators, executors or trustees liable for the tax is in the nature of a penalty for not discharging a duty demanded of them by the law. The beneficiaries under the will appealed from the order of the surrogate fixing the transfer tax, and upon a hearing of the appeal the learned surrogate reversed the order, and appeal comes to this court from the order of reversal.

The principal contention of the various respondents is that while the estate was originally subject to the transfer tax, this right has been lost to the State through the operation of subdivision 2 of section 382 of the Code of Civil Procedure, which fixes a limitation of six years upon an action to recover upon a liability created by statute. It may well be urged that the proceeding now before the court, which is to appraise, assess, determine and fix the amount of the transfer tax, is not an action to recover upon a liability created by statute, and that the Statute of Limitations goes merely to the

remedy. But as it may be assumed that this is a preliminary step in the proceeding to collect such tax, we may pass this over and assume that if the remedy is barred the proceedings preliminary to the action fall with it, and we will discuss the question of the bar of the statute.

The respondents rely very largely upon the case of *People ex rel. New York L. & I. Co. v. Roberts* (157 N. Y. 70), but the court in that case has pointed out a very significant distinction between the Corporation Tax Law and the Taxable Transfer Act. At page 75 the court say: "The tax, which is imposed upon a corporation, is not made a lien upon its property; but constitutes an obligation, for the enforcement of which remedies are prescribed, which the Comptroller of the State may avail himself of. As an obligation, it should be regarded in the same light as are the obligations of individuals, in view of the general operation of the Statute of Limitations, etc. Under the Taxable Transfer Act the tax is made a lien upon the property, to remain "until the same is paid," and it may be fairly questioned if a Statute of Limitations could be construed to bar an action or proceeding to foreclose a lien which is to continue until the tax is paid.

However, if it be assumed that the statute would operate to bar any proceeding to collect this tax, which has not been collected because of the neglect of the executors to discharge the duty imposed upon them by law, we are of opinion that the Legislature has removed such bar. Chapter 737 of the Laws of 1899 (adding to Tax Law [Laws of 1896, chap. 908] § 282) provides that "The provisions of the Code of Civil Procedure, relative to the limitation of time of enforcing a civil remedy, shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by articles nine or ten of said chapter" (Chap. 908 of the Laws of 1896, covering this question), "and this act shall be construed as having been in effect as of date of the original enactment of the Corporation and Inheritance Tax Law, provided, however, that as to real estate in the hands of *bona fide* purchasers, the transfer tax shall be presumed to be paid and cease to be a lien as against such purchasers after the expiration of six years from the date of accrual. This act shall not affect any action or proceeding now pending."

It cannot be doubted that the Legislature intended to make this

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statute retroactive; that it intended to relieve proceedings under the Inheritance Tax Law from the bar of the statute, if such existed, except that as to innocent purchasers of real estate, they were relieved from the lien prescribed by the original acts after the expiration of six years. This proviso is purely and simply for the benefit of innocent purchasers, and can give no rights or exemptions to executors, administrators, trustees or beneficiaries. It is insisted, however, that the bar of the statute was complete before any of the proceedings here under consideration had been instituted, and that there must be vested rights which could not be disturbed. The respondents urge that it would be unjust to reopen a matter which had been judicially determined after the bar of the statute had run, and compel executors to make good deficiencies, etc., but the answer to this is simple; executors, trustees and administrators are presumed, like other people, to know the law, and they have no right to permit the property on which the State has a lien to pass out of their possession or control until that lien has been discharged. The property comes into their possession subject to this lien. It is made their duty to call the attention of the public officials to the fact that they have the estate in their possession, and that it is subject to the tax, and until this duty is discharged and the State has been paid this tax as the compensation which it exacts for permitting the devolution of the estate, there is no one who can give a good title to the property, and this much of the law is known to the beneficiaries and to all persons interested, so that there can be no such thing as a vested interest in the estate, no matter how completely it may have been distributed. All of the property passes out of the hands of the executors or trustees subject to the lien, though in the case of innocent purchasers of real estate the statute limits the enforcement to six years. As the recipients could not get a title, freed from the lien, they could get no vested rights of property, independent of such lien, and the Legislature certainly has a right to say that there shall be no Statute of Limitations in respect to such cases, and to make the repeal relate back to the original act for the assessing of the tax, to the end that the State may get what is lawfully due, even in those cases in which the executors, administrators or trustees have failed to discharge the duties prescribed by the law under which they have assumed to act.

The order appealed from should be reversed, and the prior order affirmed.

HIRSCHBERG, P. J., GAYNOR, RICH and MILLER, JJ., concurred.

Order of the Surrogate's Court of Westchester county reversed, and the prior order affirmed, with costs.

EUGENE C. POMEROY, Appellant, v. JULIA P. NEWELL and Others,
Respondents. (No. 2.)

Second Department, March 8, 1907.

Vendor and purchaser—correspondence not constituting contract of sale—no specific performance of unaccepted option.

In an action for the specific performance of an alleged contract to convey lands which had been sold by the owners to third parties it was shown that the plaintiff had telegraphed to the owners making an offer for the property "free and clear." The owners replied, "Will take cash above all liens which you must assume." Plaintiff replied, "Will you accept \$50,000 cash, I assuming all liens?" to which the owners answered, "Will take \$60,000 cash above all liens and commissions." Thereafter the plaintiff telegraphed, "Will you give thirty day option at last figures?" to which the owners replied, "Will give thirty day option. Notify Blackwell" (the latter being the owners' real estate agent), to which plaintiff two days afterwards replied, "Your cable granting option received. Have accepted option. Notified Blackwell."

Held, that the correspondence did not constitute a contract of sale, but a mere option or continuing offer, which, not being founded upon a consideration, was subject to withdrawal at any time before acceptance by the plaintiff;

That the sale to third persons was a withdrawal of the option.

That mere assent to an offer of an option is not a purchase thereunder;

That the plaintiff was not entitled to specific performance, which will never be decreed unless there be mutuality of contract.

APPEAL by the plaintiff, Eugene C. Pomeroy, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Queens on the 16th day of March, 1906, upon the decision of the court, rendered after a trial at the Queens County Special Term, dismissing the complaint upon the merits.

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Second Department, March, 1907.

Archibald Foote Clark [*Joseph D. Redding* with him on the brief], for the appellant.

George E. Blackwell [*William C. Timm* with him on the brief], for the respondents Newell and Pomeroy.

Henry H. Abbott, for the respondent Rickert.

JENKS, J.:

This is an appeal from a judgment dismissing the complaint in an action for specific performance. In consideration of this disposition we must remember that such relief is "largely in the discretion of the equity courts" (*Dunkel v. Dunkel*, 141 N. Y. 434), and that in *Stokes v. Stokes* (148 id. 716) the following rule was quoted and approved: "A contract must possess certain elements in order that a court of equity may exercise jurisdiction to compel its performance. 'It must be upon a valuable consideration. It must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be, in general, mutual in its obligations and its remedy.' (3 Pomeroy's Eq. Jur., sec. 1405.)"

The plaintiff declares upon an agreement to convey lands in the county of Queens, possessed by the defendants Mrs. Newell and Miss Pomeroy, who were his aunts. At the time of the alleged agreement the plaintiff was in this country and the said defendants were in France. The husband of Mrs. Newell, George B. Newell, Esq., who was the agent of these defendants, was also in France, and the dealings between the plaintiff and Mr. Newell were by telegraph and by post. The property had been in the family for years and was well known by all of the parties. It had been the subject of correspondence between them for some time. Mr. Newell had put the property in charge of the law firm of Blackwell Brothers of New York city, who were authorized to sell it and who were continuously active to make a sale that would be acceptable to their clients. These facts were familiar to the plaintiff.

It appears that the Messrs. Blackwell made a sale of the lands to a third party, which the defendants in recognition of the Messrs. Blackwell's authority in the premises felt bound to confirm and did

confirm. It was essential then that the plaintiff should establish a prior engagement of the defendants to him, and thus the contest waged about the telegraphic communications before the period that the Blackwells notified the plaintiff of the sale made by them. This was February fifteenth. On February 9, 1905, the plaintiff had telegraphed to Mr. Newell: "Will give Pomeroy and Newton (or Newell) seventy-five thousand for Astoria property free and clear. Answer." On February 10, 1905, Mr. Newell had telegraphed: "Will take cash above all liens which you must assume." On that day the plaintiff telegraphed to Newell: "Will you accept fifty thousand cash, I assuming all liens?" On February eleventh Mr. Newell had telegraphed: "Will take sixty thousand cash above all liens and commissions." On February eleventh the plaintiff telegraphed: "Will you give thirty day option at last figures?" And on February twelfth Mr. Newell telegraphed: "Will give thirty day option. Notify Blackwell." On February fourteenth the plaintiff telegraphed: "Your cable granting option received. Have accepted option. Notified Blackwell."

The issue as to an agreement was finally defined as to the force and effect of the expression, "Have accepted option," the plaintiff insisting that thereby he agreed to purchase the property and the defendants contending that thereby the plaintiff but agreed to establish an option between the parties whereby if he offered the stipulated price within thirty days he would purchase the property. The learned Special Term sustained the defendants, and I am of opinion that its judgment should be affirmed. The determination of the intention is not dependent on the question whether the language used was futile or effective; by this I mean whether the plaintiff thereby did or did not secure an option. If he sought to secure an option and did not, we should not, therefore, hold that he he did not intend to secure it. The agreement for an option and the option are two different things (*Ide v. Leiser*, 10 Mont. 5; *Black v. Maddox*, 104 Ga. 157; 21 Am. & Eng. Ency. of Law [2d ed.], 924 and 925), and the mere assent to an offer of an option is not a purchase under the option. (*Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240.) Otherwise acceptance of the offer of an option would destroy the option by merging it in the purchase. In this case the plaintiff, in order to maintain his legal right, was forced

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to declare on an agreement to purchase, for if he stood upon the proposition that the words "Have accepted option" secured for him an option, he must fail, inasmuch as what the parties supposed was an option was but a mere continuing offer, in that there was no consideration for it, and hence it could be withdrawn at any time before the plaintiff availed himself of it. (21 Am. & Eng. Ency. of Law, *supra*, 929; *Quick v. Wheeler*, 78 N. Y. 300, 304. See, too, *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463; *Boston & Maine Railroad v. Bartlett*, 3 Cush. 225.) And the sale by the Blackwells would amount to such withdrawal. (*Dickinson v. Dodds*, *supra*.)

The words "Have accepted option" have not received a judicial definition from the Court of Appeals so as to warrant the assumption that the parties had a settled definition in mind. (*Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56.) The industry of the learned counsel for the appellant has collected instances of the use of this expression, in judicial opinions and in legal head notes, to describe past acts in closing the option. It may be conceded that such uses were accurate, but on the other hand instance is not wanting of a use of the same expression in the sense contended for by the defendants in this case. In *Chicago & G. E. R. Co. v. Dane* (*supra*), GROVER, J., for the court, writes: "Upon the receipt of the defendants' offer to transport not to exceed 6,000 tons upon the terms specified, it merely accepted such offer and agreed to be bound by its terms. This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any." We are not limited by legal definition or by rigid meaning, but the question may be answered in consideration of the meaning of the words, in the light of surrounding circumstances, of the purpose in mind and of the end sought. (*Maloney v. Iroquois Brewing Co.*, 173 N. Y. 303; *Gillet v. Bank of America*, 160 id. 549.)

The parties had failed to make any agreement for immediate purchase, and they were apart as to the purchase price. The defend-

ants demanded more than the plaintiff offered. Thereupon the plaintiff's object was to secure an option in order, as he says, that he might look into the "taxes, assessments, arrears and interest." It is to be noted that the plaintiff did not ask for the option, so that an answer of the defendants might constitute a meeting of the minds, nor did he make an offer that he would take an option. He but makes inquiry, "Will you give thirty day option at last figures?" In Wald's Pollock on Contracts (Williston's 3d ed. p. 15) it is said: "*First*, we have to consider in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration. This depends on the intention of the parties as collected from their language and the nature of the transaction, and the question is one either of pure fact or of construction. Evidently it may be an important one, but due weight has not always been given to it." Lawson in his article on Contracts in Cyclopaedia of Law and Procedure (Vol. 9, p. 273), says: "If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." Legally if the matter had ended with the defendants' statement "Will give thirty day option," the plaintiff would not have been bound, for there was no assent. Notice of a refusal to accept was not required of him. (*Corning v. Colt*, 5 Wend. 253.) And as the parties were not together, an acceptance must be manifested by some appropriate act. (*White v. Corlies*, 46 N. Y. 467.) The purchase involved a large sum; the parties were thousands of miles apart, the communication was by cable which could only be verified by that means, and the defendants had required that Blackwell should be notified. What was more natural than that the telegram offering the "option" should be acknowledged and that the notification required should be reported as made? If the telegram was to be acknowl-

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edged at all, it was but natural that the plaintiff should make some expression of assent to the offer. The words "Have accepted option" more naturally refer to the acceptance of the "option" than to the purchase of the property. And in passing it may be noted that in his telegram of the sixteenth the plaintiff does not ask the defendants to cable Blackwell "Have accepted option," but to "Cable Blackwell have purchased." It may be that the economy of saving a single word explains the variance, or it may be that the variance in language indicates different ideas. It is natural to the course of business dealing that an acceptance should follow an offer, if one desire to avail himself of the offer, and it is unnatural that such an one, even inviting an offer, should remain without word or action of assent when the offer is made, relying on the fact that the offerer assumes an assent from an invitation. The telegram of Mr. Newell in answer to the inquiry whether a thirty-day option would be given, was sent from Paris on Sunday, February twelfth, and was received on that day, presumably, in Madison, New Jersey. February thirteenth was celebrated as Lincoln's birthday, and yet the plaintiff, who had asked for an option of thirty days which he understood had been given to him and, therefore, must then have supposed, for aught that appears, that he had yet twenty-seven or twenty-eight days in which to exercise his right, asserts that on the following day, February fourteenth, he agreed to purchase the property. He testifies that he asked for the time in order that he might determine the taxes, assessments, arrears and interest against the property, and he also testifies that he had investigated the matter sufficiently in the time that intervened his receipt of the "option" and the sending of his telegram of February fourteenth. He does testify to the particulars of his investigation. But one naturally queries the reason which moved the plaintiff to such hot haste. It must be remembered that he had received no intimation from any source that there was any doubt as to his "option." On the other hand, if he intended to secure the "option," it was entirely natural, as I have said, that he should acknowledge promptly the receipt of the offer, and also in the acknowledgment express his acceptance thereof.

Specific performance is not decreed unless there be mutuality. Would a court of equity hold the plaintiff upon such language under

the circumstances as being sufficiently clear, cogent and definite, to establish an agreement on his part to purchase this property?

The question is, what was agreed upon between the parties before the sale by the Blackwells to a third party? The words and acts of the plaintiff subsequent to the notification which he received from Blackwell cannot be taken as throwing light upon the intent and purpose of the language "Have accepted option," without carrying in mind that such words were written and such acts were done after the plaintiff had thus been notified and perhaps understood that any theory of an "option" could not avail him. The learned counsel for the appellant lays stress on the fact that his letter of February fourteenth to the Blackwells is strong indication of intent and purpose. But the letter is ambiguous and consistent with the plaintiff's supposition that he had secured an option. He wrote: "I take pleasure in informing you that I have acquired the interests of my aunts." This was not the natural expression of one who had agreed to buy the property owned by his aunts. He would have said outright, I have agreed to purchase, or I have bought the property, or I have purchased the property. The plaintiff reveals himself as somewhat disingenuous. When the question came as to who should take the property, he telegraphed Mr. Newell on March second: "Under heavy obligations; am compelled to hold you to contract," and yet under cross-examination he admits there were "no specific obligations; * * * I did not refer to pecuniary obligations of any kind; * * * it was a moral obligation." It amounted, he admits, to no more than his intention. The plaintiff's letter to Mr. Newell of February twentieth is significant: "I am writing to inform you that I am now in position to purchase * * *. My reason for asking a thirty days' option was to enable me to go fully into the matter of taxes, assessments, arrears and interest which acted as a lien against the property, and I did not feel disposed to assume greater responsibilities in this matter than I could in justice to myself and family undertake." When asked upon the witness stand, "Your idea in asking an option was to find out first how much the taxes and liens were before you undertook any responsibility, is that so?" the plaintiff replied, "I wanted to know how much I had to pay for the property, of course, as near as I could find out. Q. And until you discovered that fact, you

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did not mean to buy it, did you? A. Not necessarily. By the court:
Q. Did you mean to buy it? That is not an answer. Did you mean to buy it? A. I would have had to decide that afterward.
Q. Then you did not mean to buy it then? (No answer.)” Mr. Newell appears to have acted throughout with scrupulous fairness, though with predilections for his nephew, this plaintiff. It is impossible for me, after a reading of his entire correspondence, to conclude that he had any other thought in mind than that by the telegrams of February eleventh, twelfth and fourteenth there was no agreement between him and his nephew save for an option to purchase within thirty days, and that he wished to secure such privilege for him if he could do so. In point of law there was not even that, but at most a continuing offer that was legally withdrawn before the plaintiff accepted it.

I advise affirmance, with costs.

HOOKEE, GAYNOR, RICH and MILLER, JJ., concurred.

Judgment affirmed, with costs.

In the Matter of the Transfer Tax upon the Estate of MARY COSTELLO, Deceased. (Nos. 1, 2.)

WILLIAM C. WILSON, as Comptroller of the State of New York, Appellant; WILLIAM B. DAVENPORT, as Administrator, etc., of MARY COSTELLO, Deceased, Respondent.

Second Department, March 8, 1907.

Tax — practice — appeal from order of surrogate exempting estate from taxation.

The review of a surrogate's order exempting an estate from taxation without the appointment of an appraiser should be taken first by an appeal to the surrogate and then by appeal to the Appellate Division from the affirmance or reversal by the surrogate of his order. The original order of the surrogate being in the nature of an *ex parte* order, no direct appeal therefrom lies to the Appellate Division.

APPEAL in the first above-entitled proceeding by William C. Wilson, as Comptroller of the State of New York, from a decree of the Surrogate's Court of the county of Kings, entered in said Surro-

gate's Court on the 19th day of March, 1906, declaring the estate of Mary Costello, deceased, to be exempt from a transfer tax.

Appeal in the second above-entitled proceeding by William C. Wilson, as Comptroller, etc., from an order entered in said Surrogate's Court on the 18th day of April, 1906, affirming said decree of March 19, 1906

Jabish Holmes, Jr. [*Leonard Bacon Smith* and *Frank Julian Price* with him on the brief], for the appellant.

R. M. Cahoon, for the respondent.

HOOVER, J.:

The first of these appeals is from an order of the Surrogate's Court declaring the estate of the deceased to be exempt from payment of a transfer tax. The second appeal is from an order of the Surrogate's Court affirming the order from which the first appeal is directly taken. The merits of this controversy are with the Comptroller, the appellant. The same question was argued and decided in *Matter of Mock* (113 App. Div. 913), and our decision in that case must control here. The order of exemption should, therefore, be reversed on the authority of that case.

The principal question presented by these appeals, however, is one of practice.

On the 19th day of March, 1906, there was entered in the office of the surrogate of Kings county an order adjudging that the transfer of the property of the deceased passing to her next of kin be exempt from taxation under the acts in relation to the transfer of property. The order was signed by the surrogate and seems to have been made without an appointment of an appraiser by the surrogate. On the 2d day of April, 1906, the Comptroller of the State, deeming himself aggrieved by reason of the order of exemption, appealed from the said order of March nineteenth to the surrogate of the county of Kings, and in his notice of appeal stated the grounds upon which the appeal was taken. The surrogate considered the questions raised by the appeal and on April 18, 1906, an order was entered in his office whereby the order of March 19, 1906, was affirmed.

On April 19, 1906, the Comptroller appealed to this court directly from the order of March 19, 1906; that appeal is the first

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above entitled. On the same day, to wit, April 19, 1906, the Comptroller also appealed to this court from the order of affirmance entered April 18, 1906; this is the appeal second above entitled. The question then presented by these appeals is which is the proper manner in which to review the surrogate's order of exemption, whether by direct appeal to the Appellate Division or an appeal first having been taken to the surrogate by appeal to the Appellate Division from the affirmance or reversal by the surrogate of the order of exemption or either.

In the view I take of the statute the latter is the only method permitted.

No direct appeal to this court lies from the order of March nineteenth. The statute (*post*) provides that the order must be entered by the surrogate, *as of course*, from the report of the appraiser. The order is, therefore, in the nature of an *ex parte* order and an appeal does not lie therefrom. (*Hayes v. Consolidated Gas Co.*, 143 N. Y. 641; *Matter of Johnson*, 27 Hun, 538; *People ex rel. Schlehr v. Common Council*, 30 id. 636; *Matter of Nottingham*, 88 id. 443; *Matter of Kelsey v. Church*, 112 App. Div. 408.)

The appeal should be taken from the order to the surrogate and thence the case brought to the Appellate Division. Section 232 of the Tax Law (Laws of 1896, chap. 908, as amended by Laws of 1897, chap. 284; Laws of 1899, chap. 672 and Laws of 1901, chap. 173) provides how the report of the appraiser shall be enforced; from such report it is provided that the surrogate shall forthwith, as of course, determine the amount of tax to which the estate is liable or may determine the amount of tax without appointing an appraiser. In this case, evidently without the appointment of an appraiser, the surrogate determined that the amount of the tax was nothing and entered the order of March nineteenth. And from this order an appeal lies to the surrogate, for the section goes on to provide: "The Comptroller of the State of New York or any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom to the surrogate, within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken." This language is so clear that it needs no construing; it

gives the Comptroller the right to appeal from the order of March nineteenth to the surrogate himself. This he has done, and by stating the grounds upon which the appeal is taken, he complied with the statute. After argument, his appeal resulted in an order or decree of the Surrogate's Court, and therefrom an appeal lay to this court. (Code Civ. Proc. § 2570.)

The appeal from the order of March 19, 1906, should be dismissed, without costs, and the order of April 18, 1906, should be reversed, without costs.

WOODWARD, JENKS, GAYNOR and RICH, JJ., concurred.

Appeal dismissed, without costs. Order of the Surrogate's Court of Kings county reversed, without costs.

CHRISTIAN CHRISTENSON, Respondent, *v.* LOUIS PINCUS, Appellant.

Second Department, March 8, 1907.

Pleading—practice—action for conversion and for goods sold—causes should be separately stated and numbered.

When a complaint alleges two causes of action, one for conversion and the other for goods sold and delivered, the defendant is entitled to have the causes separately stated and numbered.

Although the defendant may require the plaintiff to elect between such causes at trial, he may at his option require the causes to be separated and numbered before answering.

APPEAL by the defendant, Louis Pincus, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 3d day of January, 1907, denying the defendant's motion to compel the plaintiff to separately state and number the causes of action set forth in the complaint.

J. Charles Weschler [*Sol Rothschild* with him on the brief], for the appellant.

Ferdinand E. M. Bullowa, for the respondent.

RICH, J. :

The complaint alleges two causes of action, one for conversion and one on contract for goods sold and delivered. The plaintiff

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might have waived the tort in his pleading and then the action would have proceeded as one on contract. This he has not seen fit to do, and defendant was entitled to have the causes of action separated and numbered. (Code Civ. Proc. § 483.) It has become the settled practice that a plaintiff will be required to elect at the trial as to which of two causes of action he will try, and that would have been quite proper in this case, but defendant had the right, at his option, before answering to move to have the causes of action separated and numbered, and plaintiff would have been in time, even upon the motion to elect, to waive the tort and proceed upon the one cause of action. He failed to avail himself of the opportunity given him by the learned justice at Special Term to do this, and the order must be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

HIRSCHBERG, P. J., WOODWARD, GAYNOR and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

In the Matter of the Application of the CITY OF NEW YORK, Appellant, for a Writ of Certiorari to RICHARD MICHELL and Others, as Assessors of the Town of Southeast, County of Putnam, State of New York, Respondents.

Second Department, March 8, 1907.

Tax — certiorari to review assessment — when writ matter of right — allegations requiring grant of writ.

Certiorari under section 250 of the Tax Law is a matter of right if the facts stated in such section are set forth so as to vest the court with jurisdiction.

Allegations in a petition that the relator is aggrieved because an assessment of real property is fixed at a sum stated "which is erroneous, illegal and unjust by reason of overvaluation, the extent thereof being \$1,000,000, and your petitioner is aggrieved because the real property of your petitioner is assessed by the assessors aforesaid at an erroneous and excessive valuation," brings the case within the statute, vests the court with jurisdiction and requires the issue of the writ.

When a petition for certiorari to review an assessment of aqueducts and gate-

houses belonging to the city of New York raises the question of the illegality thereof, the question as to whether appurtenances thereto are also exempt will not be determined on an appeal from an order quashing the writ.

APPEAL by the petitioner, the City of New York, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Putnam on the 9th day of April, 1906, pursuant to an order made at the Kings County Special Term and entered in said clerk's office on the 24th day of March, 1906, quashing a writ of certiorari theretofore issued herein, and also from such order directing the entry of the said judgment.

I. J. Beaudrias [*William B. Ellison* with him on the brief], for the appellant.

Abram J. Miller, for the respondents.

RICH, J.:

This is an appeal from an order and the judgment entered thereon quashing a writ of certiorari issued to review an assessment against the city of New York, upon the ground that the petition upon which such writ issued did not show sufficient facts to vest jurisdiction in the court. The only questions before us are whether the allegations of the petition regarding the assessment of the aqueducts and gate houses (which are claimed to be appurtenances) and overvaluation are sufficient to confer jurisdiction requiring the issuance of the writ. If they are, it was not a discretionary matter, but a matter of right. (*Rochester Railway Co. v. Robinson*, 133 N. Y. 242.) Section 250 of the Tax Law (Laws of 1896, chap. 908), so far as its provisions are material in the consideration of these questions, is as follows: "Any person assessed upon any assessment-roll, claiming to be aggrieved by any assessment for property therein, may present to the Supreme Court a petition duly verified setting forth that the assessment is illegal, * * * or if erroneous by reason of overvaluation, stating the extent of such overvaluation." The paragraph of the petition alleging overvaluation is as follows: "That your petitioner is further aggrieved because the assessment of such real property of your petitioner is fixed at \$1,169,640.50, which is erroneous, illegal and unjust, by reason of overvaluation, the extent thereof being one million dollars. And your petitioner is aggrieved

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because the real property of your petitioner is assessed by the Assessors aforesaid at an erroneous and excessive valuation, far above the full value thereof." This allegation is well within the language of the statute. It alleges the assessment to be "erroneous by reason of overvaluation," states "the extent of such overvaluation," and that petitioner is aggrieved thereby. This is sufficient to confer jurisdiction upon the court, and the issue of the writ was imperative. (*Matter of Nisbet*, 3 App. Div. 171; *Matter of Corwin*, 135 N. Y. 245; *Rochester Railway Co. v. Robinson*, *supra*; *People ex rel. Commercial Mut. Ins. Co. v. Commissioners*, 144 N. Y. 483; *People ex rel. Broadway Realty Co. v. Feitner*, 61 App. Div. 156; *affd.*, 168 N. Y. 661; *People ex rel. Edison El. Ill. Co. v. Feitner*, 86 App. Div. 46; *affd.*, 178 N. Y. 577.) The petition in the case at bar does not differ materially from that in *People ex rel. Edison El. Ill. Co. v. Feitner* (*supra*). In that case it was held in effect that *People ex rel. Sutphen v. Feitner* (45 App. Div. 542) and *People ex rel. Greenwood v. Feitner* (77 *id.* 428) upon which the learned justice in quashing the writ in the case at bar seems to have relied, had been superseded by the decision in the *Broadway Realty Co.* case.

We think the petition sufficiently raises the question of the illegality of the assessments on the relator's aqueducts and gate houses connected therewith. By section 480 of the Greater New York charter (Laws of 1901, chap. 466) and the decision in *Matter of City of New York v. Mitchell* (183 N. Y. 245) aqueducts are exempt. As to whether their appurtenances are also exempt is still an open question; whether there are such structures upon the land and wrongfully included in the assessments complained of; whether they are the "tunnels and other structures" which the return admits the appellant has erected upon the tract known as "Double Reservoir I" are dependent upon the evidence to be given in the proceeding and are not to be determined in this proceeding.

The order must be reversed, with costs.

HIRSCHBERG, P. J., WOODWARD, JENKS and MILLER, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and proceedings remitted for hearing and determination.

ALFRED H. REEVES, Respondent, v. TIMOTHY D. SULLIVAN and Others, Appellants.

Second Department, March 8, 1907.

Injunction — damage — when counsel fees proper on reference to assess damage.

When a motion for an injunction *pendente lite* has been denied and a preliminary injunction vacated and set aside, the defendant, on a reference to ascertain the damage sustained by reason of the injunction, is entitled to counsel fees incurred on the return to the order to show cause, if the injunction might have remained in force had the defendant failed to appear.

APPEAL by the defendants, Timothy D. Sullivan and others, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 3d day of December, 1906, denying the defendants' motion for a reference to ascertain the damages alleged to have been sustained by reason of an injunction herein.

Louis J. Vorhaus and *Charles Goldzier*, for the appellants.

Isidor Niner, for the respondent.

RICH, J. :

The order for the preliminary injunction provided, among other things, "that the defendants and each of them be enjoined and restrained from permitting any show other than the 'Al Reeves Company' to play or appear at the Dewey Theatre during the week beginning December 17, 1906, and that the defendants and each of them be enjoined from preventing the 'Al Reeves Company' from appearing and playing at the Dewey Theatre during the week beginning December 17, 1906, and from failing to furnish the Dewey Theatre to plaintiff for the appearance of the 'Al Reeves Company' during the week beginning December 17, 1906, well-lighted, warmed and cleaned, with the scenery and equipments contained therein, necessary grips under direction of house carpenter, stage hands, property man and his assistant, gas man, janitors, electric current in house, ushers, ticket-sellers, doorkeepers, regular orchestra, coupons and regular tickets, house premiums, all licenses,

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bill-boards, bill posting and distributing, and regular newspaper advertising, and from turning over and paying to the plaintiff fifty per cent. of the gross receipts therefor during the said week of December 17, 1906, after deducting \$150 for newspaper and extra advertising; and that the defendants and each of them be further enjoined and restrained from playing or permitting to be played at the Dewey Theatre during the seasons of 1906-1907, 1907-8, and 1908-9, or during such seasons permitting any burlesque play or show or any show of any character other than those designated by the schedule or wheel referred to in the complaint herein."

The undertaking given upon the application for the injunction, after reciting the provisions of the order quoted above, provided: "That the plaintiff will pay to the defendant so enjoined, such damages, not exceeding the before-mentioned sum, as they may sustain by reason of the injunction, if the court finally decides that the plaintiff is not entitled thereto; such damages to be ascertained and determined by the court, or by a referee appointed by the court, or by a writ of inquiry or otherwise as the court shall direct."

The only question presented for our determination is whether counsel fees incurred on the motion upon the return of the show cause order was a proper element of damages. The motion for the injunction *pendente lite* was denied and the preliminary injunction annulled, revoked and set aside.

In the case of *Sargent v. St. Mary's Orphan Boys' Asylum* (112 App. Div. 674), cited by the learned counsel for the respondent, the preliminary order was limited to expire on the hearing and determination of the motion to continue and, as Mr. Justice NASH pointed out, counsel was employed to oppose the motion for an injunction *pendente lite*. No order to vacate the temporary restraining order was required and none was made. The expenses incurred for such services are not recoverable. After the decision of the motion to continue the injunction the restraining order was no longer of any force or effect in the *Sargent* case.

In the case at bar, however, the preliminary injunction enjoined and restrained defendants during the theatrical seasons of 1906-1907, 1907-1908 and 1908-1909. We think it was reasonable that defendants should appear by counsel upon the motion, and if so advised to urge that the order be vacated, and that the legitimate items of

expense incurred to this end are legitimate and proper elements of damages. (*Perlman v. Bernstein*, 93 App. Div. 335.) The injunction might have remained in force had defendants failed to appear, and the order must be reversed, with ten dollars costs and disbursements, and motion granted.

HIRSCHBERG, P. J., JENES, HOOKER and GAYNOR, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with costs.

J. J. SPURR & SONS (INCORPORATED), Appellant, v. THE EMPIRE STATE SURETY COMPANY, Respondent, Impleaded with WILLIAM W. FISCHER, Defendant.

Second Department, March 8, 1907.

Practice — deposition — commission upon interrogatories must state to whom issued.

A commission to take the testimony of a witness upon interrogatories under section 887 of the Code of Civil Procedure must name the person to whom it is issued or it will be vacated.

APPEAL by the plaintiff, J. J. Spurr & Sons (Incorporated), from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 8th day of November, 1906.

Charles T. Terry [*William R. Conklin* with him on the brief], for the appellant.

Ferd. W. Buermeyer, for the respondent.

RICH, J. :

This appeal is from an order of the Special Term denying plaintiff's motion to vacate an order for a commission to examine witnesses in the State of New Jersey upon interrogatories. The original order was defective, and the learned justice at Special Term sought to remedy the defect by an order providing that a commission issue in which no person was named as commissioner.

Authority to take the testimony of a witness upon interrogatories is

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found in section 887 of the Code of Civil Procedure. That section provides that the person to whom it is issued shall be named therein. Because of the failure to do this the order from which the appeal is taken is clearly defective. (*Hemenway v. Knudson*, 73 Hun, 227.)

The order must, therefore, be reversed, with ten dollars costs and disbursements, and plaintiff's motion to vacate and set aside the order for a commission granted.

HIRSCHBERG, P. J., JENKS, HOOKER and GAYNOR, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with costs.

BARNET SHAPIRO, Appellant, v. BARNET SHAPIRO, Defendant,
Impleaded with SAMUEL LEDER and ZALLEL ZELLMERMEYER,
Respondents, and MARCUS MICHEL and WALTER T. SCOTT,
Appellants.

Second Department, March 15, 1907.

Principal and agent — claims by various brokers to commissions.

A firm of real estate brokers, L. & Z., called the attention of a firm, M. & S., to real estate owned by one Barnet Shapiro. M. & S. in attempting to call Shapiro on the telephone were put into communication with a broker also named Barnet Shapiro, who replied that he knew about the houses and made an appointment with M. & S. to bring them and the real owner Shapiro into personal communication. The owner finally sold to M. & S., who first informed the owner that they were purchasers and not brokers, but at the time of the sale admitted that they were brokers representing one B. to whom the lands were sold. The owner being beset by the claims of the three brokers for commissions paid the amount into court.

On the issue as to which of the brokers was entitled to the commission, *Held*, that it was not error to exclude the claim of the broker Shapiro, for it did not appear that the buyer B. was induced by him to apply to the seller; That it was error to exclude the claim of the brokers M. & S. on the theory that they were not employed as agents prior to making the sale to B., such proof not being essential; That judgment awarding the commissions to L. & Z. should be reversed and a new trial granted.

APPEAL by the plaintiff, Barnet Shapiro, and by the defendants, Marcus Michel and another, from a judgment of the Municipal
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Court of the city of New York, borough of Brooklyn, in favor of certain of the defendants rendered on the 3d day of February, 1906.

Jacob W. Kahn, for the plaintiff, appellant.

C. W. Wilson, Jr., for the defendants, appellants.

Samuel Chugerman, for the respondents.

JENKS, J. :

Barnet Shapiro owned houses which were for sale. Leder, of the brokerage firm of Leder & Zellermyer, called the houses and the price to the attention of Michel, of the firm of Michel & Scott. Michel made a memorandum, including the owner's name, and went to look at the houses. Some months after, Michel & Scott attempting to call the owner, Barnet Shapiro, to the telephone called up another Barnet Shapiro, a broker, who truthfully answered that he was "Mr. Shapiro" who said that he knew about the houses and who finally made an appointment to bring Michel & Scott and the owner Shapiro into personal communication. The owner Shapiro finally agreed to sell the premises to Michel & Scott, who told the owner that they were purchasers and not brokers. When the time of closing the contract came, Michel & Scott admitted to the owner that they represented Busch, whose name they then signed to the contract, giving their own check on account of the purchase. The premises were thereafter conveyed to Busch. The broker Shapiro then sued the owner Shapiro for commissions. The owner beset also by the claims of Leder & Zellermyer and of Michel & Scott, paid the amount of the commissions into the court and was relieved by order of interpleader so that the question litigated was the contention of these three brokers. The Municipal Court gave judgment for Leder & Zellermyer.

Upon the record I cannot say that the court erred in excluding the claim of Barnet Shapiro, for it does not appear that the buyer was induced by him to apply to the seller. (*Metcalfe v. Gordon*, 86 App. Div. 368, 370, 371, and cases cited.) If the buyer was Busch there is not the slightest connection shown. If the buyers were in fact Michel & Scott they were in possession of the particulars, knew the name of the owner and were actually seeking him when the accident of name and surname permitted the

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broker Shapiro to get wind of the project and to proffer his services which were really nothing more than to secure what direct telephonic communication might have brought to pass if the right Shapiro had been found under the wrong Shapiro's telephone number. The Municipal Court excluded the claim of Michel & Scott because they were not employed as agents prior to the making of the contract of sale to Busch. I do not think that proof of such employment was essential. If Michel & Scott before the contract was made out to Busch revealed that he was their principal and they were after all but the brokers, "a conscious appropriation" of their labors as brokers or indeed a "mere acceptance" of such labors might suffice to establish the relationship of broker in the sale. (*Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378.) The difficulty with holding the judgment in favor of Leder & Zellermeier is that they did not produce Busch, the purchaser. It is true that they gave information to Michel & Scott, but Michel & Scott produced Busch, and if Busch was the purchaser Leder & Zellermeier did not earn their commissions. (*Sibbald v. Bethlehem Iron Co.*, *supra*; *Colwell v. Tompkins*, 6 App. Div. 93; *affd.*, 158 N. Y. 690.) The strongest aspect of the case for Leder & Zellermeier is that Michel & Scott were the real purchasers and that Busch was but a dummy. But suppose this were the fact, the evidence is not sufficient to sustain their claim under the rules of the cases last cited. If such were the case and they could go further to show that they produced the real purchaser, that the sale to Busch was a device to avoid the payment of commissions, or that the owner capriciously changed his mind after Michel & Scott had been produced as a fit purchaser, then quite another question would be presented. (*Sibbald v. Bethlehem Iron Co.*, *supra*.)

I recommend that the judgment be reversed and that a new trial be ordered, costs to abide the event.

HIRSCHBERG, P. J., HOOKER, GAYNOR and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

EDWARD P. MOSSEIN, as President of LOCAL UNION No. 471 of THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Respondent, v. THE EMPIRE STATE SURETY COMPANY, Appellant.

Second Department, March 1, 1907.

Principal and surety—undertaking that principal deposit moneys—liability of surety—interest—practice—amendment conditioned on cause retaining place on the calendar—when notice of trial not necessary.

One J. secured a judgment against M. as president of an association. In proceedings supplementary to execution the judgment creditor had discovered moneys which had been applied upon the execution. A motion by M. to set aside the judgment was denied, and thereafter M. was allowed to perfect his appeal from such denial and the order required J. to make restitution of the sum obtained in supplementary proceedings by depositing it in a bank to the credit of M.'s association. Before the trial J. gave an undertaking (on which the present defendant was surety), providing that if the order of restitution were affirmed J. would pay the sum directed by the judgment. In an action against the surety based upon the fact that restitution had never been made, *Held*, that the defendant guaranteed that the restitution should be made by a deposit of the sum in a bank to the credit of M.'s association, which was all that could be required in the present action;

That the principal of the surety in the suit was entitled to a strict construction of the undertaking and to the redeposit of the money;

That as the surety had only undertaken that J. should deposit the money, M. was not entitled to a judgment that the sum be paid to him outright as president of the association;

That the court had power to require said restitution;

That interest is properly charged against the surety from the time its liability became determined;

That when a surety defends a suit brought to compel the fulfillment of its undertaking it is chargeable with costs.

The Special Term in allowing an amendment to a complaint may require that the amendment be without prejudice to the position of the cause on the trial calendar and a subsequent notice of trial need not be served by the plaintiff.

APPEAL by the defendant, The Empire State Surety Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 9th day of March, 1906 upon the verdict of a jury rendered by direction of the court, and also (as stated in the notice of appeal) from an order

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entered in said clerk's office on the 20th day of February, 1906, denying the defendant's motion to strike the case from the calendar.

F. J. Moissen, for the appellant.

William F. Hagarty [*James T. O'Neill* with him on the brief], for the respondent.

JENKS, J. :

The suit was begun against Manning, this plaintiff's predecessor; but to avoid confusion I shall speak of Manning as Mossein.

I think that this judgment is erroneous. The defendant was a surety. Johnson secured a judgment in a Municipal Court against Mossein, as president, etc., by default. After a deal of practice between the parties the Special Term made an order of correction so that Mossein perfected his appeal from an order denying his motion to set aside that judgment. That order also required Johnson or her attorney in that case to make restitution of the sum of \$296.17 by depositing it in a bank to the credit of Mossein's association within five days. This sum had been applied on the judgment in proceedings supplementary to execution. We affirmed that order with modifications. (See *Johnson v. Manning*, No. 1, 75 App. Div. 285.) The provision for restitution, however, was not affected. Before that appeal Johnson gave an undertaking, which reads as follows: "Whereas, on the 3rd day of April, 1902, in the Supreme Court, at a Special Term thereof, the above-named John J. Manning, as president, &c., defendant and respondent, obtained an order against the above-named Christina Johnson, plaintiff and appellant, directing the plaintiff herein and her attorney, George Gru, to make restitution of the sum of two hundred and ninety-six 17/100 (\$296.17) dollars to the defendant herein by depositing the said \$296.17 with the Germania Savings Bank to the credit of said defendant association. And the appellant feeling aggrieved thereby intends to appeal therefrom to the Appellate Division of the Supreme Court, Second Department. Now, therefore, the Empire State Surety Company, having an office and place of business at No. 375 Fulton Street, in the Borough of Brooklyn, City of New York, does hereby, pursuant to the statute in such case

made and provided, undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said appeal, not exceeding five hundred dollars, and does also undertake that if the judgment or order so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment or order or the part thereof as to which said judgment or order shall be affirmed." This action is based upon the fact that the restitution was never made. It is quite clear that the sole purpose of the order for restitution was to restore the deposit in the event that Mossein might ultimately relieve himself from the judgment obtained upon default either by setting aside the service of the summons and complaint or by opening the default.

The power to make the order requiring such restitution was challenged on this trial, but we have already affirmed it. I think that our affirmance was right. In *Granger v. Craig* (85 N. Y. 619) it is said: "The Code, however, does not abridge the power that the Supreme Court has always had over its own judgments, to correct mistakes in them, to vacate them for irregularity, to stay proceedings on them for such time and on such terms as to the court seem proper." (See, too, *Genet v. President, etc., D. & H. C. Co.*, 113 N. Y. 472, 474; Code Civ. Proc. § 217.) In *Graham's Practice* (2d ed. p. 367) it is said: "So also, where a writ of error is brought, and bail in error put in within four days after judgment, if the execution have been levied, the court will direct restitution of the amount collected, or of premises of which the party has been turned out of possession, under it. (7 Cowen, 417; * 1 Wendell, 81; † 5 Wendell, 288.†)" In *Bank v. Elliott* (60 Kans. 172) it was contended that an order of restitution made in the action was unauthorized as not positively afforded by the Code. The court said (p. 175): "There is no difficulty there; the motion and order were only steps in a pending action. The parties being before the court, and the matter of restoration being incidental to the action, there can be no question of the power or duty of the court to enforce restoration in that proceeding. Instead

* *Jackson v. Schaubert*. † *People v. Judges of New York Common Pleas*.

‡ *Mitchell v. Thorp*.—[*REP.*]

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of multiplying cases, it is the policy of our Code that the rights of the parties be determined as far as practicable in a single litigation, and we think the court was warranted in enforcing restitution in a summary manner upon the motion of the defendant."

But the defendant's liability "is limited to the express terms of the contract, and his obligation should be construed strictly and favorably to the surety so far as is warranted by the terms employed." (*Ward v. Stahl*, 81 N. Y. 408.) That contract is that restitution will be made by depositing the sum with the Germania Bank to the credit of the said defendant association, and this is all that should be required of the defendant with respect to that sum.

It may be entirely true that as to third parties it is immaterial whether a person receive money or whether it be redeposited to his credit, and that there is no complication in this case which makes one disposition or the other of consequence to the surety so long as it is protected by a judgment. But Johnson, the principal of the defendant, as the plaintiff in the action which proceeded to judgment in her favor, is entitled to the strict construction of the undertaking to the end that there should be a redeposit of the money. She docketed her judgment and issued execution thereon to the sheriff. Upon return of execution unsatisfied proceedings supplementary were taken which revealed this deposit, and it was applied on the judgment. We modified the order which denied a motion made to set aside the judgment and subsequent proceedings taken pursuant thereto by staying all proceedings in enforcement of the judgment so docketed until the hearing and disposition of proceedings which Mossein might be advised to take and promptly might take toward relief from said default. (*Johnson v. Manning*, No. 1, 75 App. Div. 285.) We did not set aside the proceedings, but held them in abeyance, and it may well be that Johnson had proceeded so far and so well as to sequester that sum, subject to her right of specific appropriation to her judgment in the event that she finally held that judgment. The plaintiff read in evidence the transcript of the judgment which Johnson had recovered, and it appears by the uncontradicted evidence of the defendant that such judgment had never been reversed or set aside. It is obvious, then, that Johnson being only required to redeposit the money, and the surety having only undertaken that this should be done, Mos-

sein should not have judgment upon that undertaking that the sum should be paid to him as president outright if by any possibility such a variance might prejudice Johnson. Moreover, it appears that Johnson could not enforce her judgment by execution, but was put to proceedings supplementary, whereupon this deposit was revealed. If, then, instead of redeposit, there is direct payment, the judgment creditor has no assurance in fact that she may collect her judgment. I think, however, that the error in the judgment may be corrected here. (*Outwater v. Moore*, 124 N. Y. 66; *Baylies N. T. & App.* [2d ed.] 414, and authorities cited.) The interest is properly chargeable against the defendant from the time its liability became determined. (*Poillon v. Volkennig*, 11 Hun, 385.) And inasmuch as the defendant defended the suit brought to compel the fulfillment of its undertaking, it is chargeable with the costs thereof. (*Kip v. Brigham*, 7 Johns. 168.) The plaintiff was entitled to enforce his right to the restitution by action if he saw fit. (*Haebler v. Myers*, 132 N. Y. 363; 18 Ency. of Pl. & Pr. 888 and note, 895 and notes; *Doe v. Crocker*, 2 Ind. 575.)

As to the point made that the case was not properly moved for trial in that no notice had been served by the plaintiff and the case, therefore, was not properly upon the calendar, it appears that the Special Term in allowing the amendment to the complaint provided: "Service of said amended complaint shall be without prejudice to the position of the case on this General Trial Term calendar of this court, and that the said case retain its said place upon said calendar." This provision was within the power of the court. (*Myers v. Metropolitan Elevated R. Co.*, 16 Daly, 410, 413, citing cases.) The court denied the application that the case be not tried on the ground that "Under the rules of the court all applications for postponement are made in Part I and cases are sent from Part I to the various trial parts for disposition. I deny this application to adjourn on the ground that all such applications must be made in Part I, and the case being sent here I must assume that the court in Part I has passed upon this application and denied it." I think that the learned court was correct. (General Rules Pr., rule 83; Calendar Rules of Trial Term, Kings Co.) In any event the appellant has not pursued the correct practice to raise the question. (*Martin v. Hicks*, 6 Hun, 74.)

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The judgment must be modified as indicated, and as modified affirmed, without costs.

HOOKEE, RICH and MILLER, JJ., concurred.

Judgment and order modified as indicated in the opinion of JENKS, J., and as thus modified affirmed, without costs. Order to be settled before JENKS, J.

CHARLES METZ, Appellant, v. THE HARBOR AND SUBURBAN BUILDING AND SAVINGS ASSOCIATION, Respondent.

Second Department, March 1, 1907.

Vendor and purchaser — sale of lands to be paid for by installments — payment to agent contrary to contract.

When an executory contract for the sale of lands, the consideration to be paid in installments, provides that the vendor's agents are "not permitted to collect installments," a vendee who has paid installments to the vendor's agent, and who sues for specific performance of the contract, is not entitled to a judgment allowing him for the installments paid.

APPEAL by the plaintiff, Charles Metz, from portions of an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 12th day of April, 1906, upon the decision of the court rendered after a trial at the Kings County Special Term.

Suit for specific performance of a contract to convey real property.

The contract price was \$1,300 and the contract provided that payment should be made "Fifty (\$50) dollars upon execution and delivery of this contract, and fifteen (\$15) dollars on account of the contract each and every month from the date thereof."

After the signatures came a page for the entry of the installments as paid. It was headed as follows: "Payments on account of the within contract. Agents not permitted to collect instalments."

After execution by the company the contract was delivered to the agent who made the sale for delivery to the purchaser. He delivered it and at the same time collected the \$50. He received back the duplicate of the contract signed by the purchaser and kept it. Thereafter he collected 28 monthly installments and entered

their receipt by him on the contract page of the purchaser's duplicate. It does not appear that the purchaser knew the agent kept the other duplicate instead of turning it in to the defendant.

Clarence E. Sutherland, for the appellant.

Alexander S. Bacon, for the respondent.

GAYNOR, J.:

The learned trial court in decreeing specific performance only allowed the plaintiff on account of the purchase price the \$50 paid on delivery of the contract, and this is why the plaintiff appeals. The judgment is correct, for the contract when delivered gave notice to the plaintiff that the agent had no authority to collect the monthly installments. The defendant never waived this. Instead of returning to the defendant the duplicate of the contract signed by the purchaser, the agent kept it without authority and collected and embezzled 28 installments in addition to the \$50 paid on the delivery. Besides, there was no evidence of knowledge in the purchaser that the agent had possession of the defendant's duplicate when he collected the installments (*Crane v. Gruenewald*, 120 N. Y. 274).

The judgment should be affirmed.

JENKS, HOOKER, RICH and MILLER, JJ., concurred.

Interlocutory judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MARY O'NEILL, Appellant.

Second Department, March 1, 1907.

Court—appeal from order of justice of Special Sessions sitting in Children's Court.

Appeals from the Court of Special Sessions in the borough of Brooklyn are to the Appellate Division. But appeals from orders by the Children's Court of that city in cases of charges against children not amounting to crime, where the justices of said court act as magistrates, lie to the County Court.

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APPEAL by the defendant, Mary O'Neill, from an order of the County Court of Kings county, entered in the office of the clerk of the county of Kings on the 17th day of December, 1906, dismissing the appeal for lack of jurisdiction.

An order was made by a single justice of the Court of Special Sessions in the Children's Court in the borough of Brooklyn committing this appellant, a female child under 16 years of age, to the custody of an institution under section 291 of the Penal Code, on the ground that she did not have proper guardianship (Sub. 2). An appeal therefrom to the County Court of Kings county was dismissed on the ground that the appeal did not lie to that court but to this court.

Walter Lester Glenney, for the appellant.

Peter P. Smith [*John F. Clarke* with him on the brief], for the respondent.

GAYNOR, J.:

By the charter of the city of New York a city magistrate may not hold a court of Special Sessions and try misdemeanors as formerly. He may only try, but not as a court, charges of those lesser things which do not amount to misdemeanors, of which vagrancy, or being a disorderly person, or that a child begs, or is without proper guardianship, and the like, are examples (Code Crim. Pro. secs. 887, 899; Penal Code, sec. 291). These are not crimes but only conditions. Such courts of Special Sessions have to be held by justices specially appointed for that purpose, and three must sit to make a court (Title 3; sec. 1405 *et seq.*). And appeals from such courts are the same as from judgments on indictments, viz., to the Appellate Division of the Supreme Court (sec. 1414).

By subsequent sections of this same title of the charter, which came in as amendments or additions after the charter was in effect, the justices of Special Sessions of the first division (Manhattan and Bronx boroughs), and those of the second division (Brooklyn, Queens and Richmond boroughs), are respectively required to assign "a separate part for the hearing and disposition of cases heretofore within the jurisdiction of city magistrates involving the trial

or commitment of children, which part shall be called the children's court." The children are to be under 16 years of age. It is then provided that the "justice or justices" holding such a court shall "have all the powers, duties and jurisdiction now possessed by the city magistrates" "in all such cases" and shall "supersede" such magistrates therein. This, be it observed, relates only to magisterial powers and duties, which it confers on the justices of the Special Sessions courts, whereas theretofore they could not act as magistrates, but only as a court of Special Sessions. It is also provided that in the trial of such children on charges of misdemeanors one of such justices instead of three may constitute such children's court of Special Sessions unless the prosecution or the defense objects thereto (secs. 1418, 1419).

In the foregoing system no appeals are provided for by the city charter except by section 1414, and that only provides for appeals from convictions by courts of Special Sessions. Other appeals, *i. e.*, from orders or judgments of magistrates are left as they were. The transfer of the trial of those lesser charges not amounting to crimes against such children from the city magistrates, who theretofore tried them, to the justices of the children's court of Special Sessions, as magistrates — *i. e.* from one set of magistrates to another set — did not change the method of appeal in such cases. Section 749 of the Code of Criminal Procedure regulates appeals from magistrates, and requires them to be to the county court.

The order should be reversed, and the appeal heard in the county court.

HIRSCHBERG, P. J., JENKS, RICH and MILLER, JJ., concurred.

Order of the County Court of Kings county reversed and appeal directed to be heard in said court.

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HENRY H. PETZE, Appellant, v. DANIEL J. LEARY, Respondent.

Second Department, March 1, 1907.

Contract — pleading — promise founded on performance of existing obligations.

A complaint alleging in substance that simultaneously with the plaintiff's contract to serve as clerk of a corporation at a fixed salary, the defendant, who was president, stockholder and director thereof, promised to give him fifty shares of stock "in consideration of the faithful compliance by the plaintiff with the terms of the aforesaid contract between the said corporation and the plaintiff," which promise he failed to perform, does not state a cause of action as the defendant's contract was without consideration.

It seems, that had the plaintiff alleged that his contract for services with the corporation had been the consideration for the defendant's promise or that the plaintiff had been induced to make his contract with the corporation by the defendant's promise, a consideration would have been stated.

When a complaint sets out the consideration for an alleged contract it excludes proof of other or further consideration.

APPEAL by the plaintiff, Henry H. Petze, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 6th day of July, 1906, upon the decision of the court, rendered after a trial at the Kings County Special Term, sustaining the defendant's demurrer to the complaint.

It is alleged in the complaint that the plaintiff made a written contract with a named corporation, of which this defendant was a stockholder, director and president, to serve it as chief clerk and auditor for five years at a salary and compensation fixed therein. It is next alleged that simultaneously with the making thereof the defendant made a written contract with the plaintiff that "in consideration of the faithful compliance by the plaintiff with the terms of the aforesaid contract between the said corporation and the plaintiff," the defendant would at the end thereof give him 50 shares of the stock of the said corporation. It is then alleged that in the first year of such service the defendant "personally instigated and procured" the discharge of the plaintiff by the said corporation from such employment, thereby preventing him from earning of

the defendant the said 50 shares, of the value of \$100 each, to his damage, etc.; and the prayer is for \$5,000 damages.

A demurrer to the complaint for not stating facts sufficient was sustained.

William S. Maddox, for the appellant.

Paul Gorham [*David McClure* with him on the brief], for the respondent.

GAYNOR, J.:

If the defendant's contract had been made after the plaintiff's contract of service with the corporation, it would be without consideration to the defendant and void, for the plaintiff's agreement to do what he was already bound to do by the prior contract would be no legal consideration (*Carpenter v. Taylor*, 164 N. Y. 171).

But the allegation is that they were made simultaneously. Does that make a difference? The essence is the same. There is no difference in respect of the consideration to say, "I will give you \$100 if you perform your contract of service made with B yesterday," or "I will give you \$100 if you perform your contract of service made with B this same instant." In each case the consideration for your promise is that your promisee perform an existing contract obligation of his to a third person. That obligation exists when you complete your promise, whether it be a day old or comes into existence concurrently with your promise; it exists at the time your promise takes effect.

If the making of the contract by the plaintiff with the corporation had been the consideration to the defendant for the making of the contract by him with the plaintiff, or, conversely, if the plaintiff had been induced to enter into his contract with the corporation by the contract of the defendant with him, there would be a legal consideration. But that is negated by the allegation of the complaint that the consideration was that the plaintiff should faithfully perform his contract of service with the corporation — not that he should make it. This excludes any other or further consideration, for it is alleged to be the consideration.

The making of the two contracts simultaneously might enable a

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finding of fact to be made that the consideration, or inducement to the defendant to make his contract was the making of the other contract by the plaintiff, but we have not to do with a question of evidence but with one of pleading; and we may not assume that that was the consideration, for the complaint alleges that the consideration was another thing, *i. e.*, that the plaintiff should faithfully keep his contract of service. If the complaint had alleged that each contract was the consideration for the other, this question of pleading would not be here, although a question might arise on the trial whether such consideration did not need to be expressed in the contract with the defendant in order to be proved.

The interlocutory judgment should be affirmed.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, JJ., concurred.

Interlocutory judgment affirmed, with costs.

LIZZIE UBART, Respondent, *v.* THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Second Department, March 1, 1907.

Pleading — defense of lack of jurisdiction dependent upon facts must be taken by answer — when denials on information and belief insufficient.

Lack of jurisdiction depending upon a question of fact, such as the non-residence of the plaintiff, must be pleaded as a defense, or else evidence thereof may be excluded.

Hence, when a plaintiff has unnecessarily alleged her residence in the complaint, a foreign defendant cannot raise the issue by a general denial, for a denial does not raise issues on immaterial allegations of the complaint.

Moreover, an answer which "on information and belief" denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the complaint is not good as a denial.

RICH, J., dissented in part, with opinion.

APPEAL by the defendant, The Baltimore and Ohio Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 11th day of October, 1905, upon the verdict of a jury, and also from an order entered in said clerk's office on the

19th day of October, 1905, denying the defendant's motion for a new trial made upon the minutes.

Since the judgment was entered the plaintiff, Lizzie Ubart, has died, and her administrator has been substituted.

J. P. Cotton, Jr. [*H. A. Moore* with him on the brief], for the appellant.

Louis J. Vorhaus [*Charles Goldzier* with him on the brief], for the respondent.

GAYNOR, J.:

It is claimed by the appellant that the plaintiff (now deceased) was not a resident of the State at the time of the commencement of the action, and therefore could not maintain the action for the reason that the appellant is a foreign corporation (Code Civ. Pro. sec. 1780). There was no such issue on the pleadings. Our Supreme Court being a court of general jurisdiction its jurisdiction is presumed unless lack of jurisdiction appear on the complaint itself. It is true that the complaint alleged that the plaintiff was a resident of the State, but no issue could be raised thereon by the denial, because it was an unnecessary allegation. It was no part of, and therefore immaterial to the cause of action, and (as is the every day rule) no issue can be joined on an immaterial allegation in a pleading (*Brown v. Travellers' Life Ins. Co.*, 21 App. Div. 42; *Linton v. Unexcelled Fireworks Co.*, 124 N. Y. 533). The residence of the plaintiff was material to the jurisdiction of the court, not to the cause of action. Her non-residence was a defence, and had to be pleaded as such in the answer to be put in issue; and the burden of proof thereon would be on the defendant, as is the case with all defences. It was not so pleaded. No issue of fact can be litigated which the pleadings do not present. The plaintiff could not be confronted with an issue of her non-residence on the trial any more than with any other issue of fact not presented by the pleadings. That if it happened to appear on the trial by the plaintiff's testimony or otherwise that the plaintiff was a non-resident the court would on the defendant's motion have to dismiss the case, or could do so of its own motion, or even on a motion before trial, the facts being undisputed (*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315), is another

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question altogether. We are now dealing with a question of pleading. A plea to the jurisdiction for non-residence, or on any other question of fact, has to be made now as formerly by the defendant. The plea or defence of no jurisdiction has not been abolished. A party may not be surprised by such a question on the trial. Where jurisdiction depends on a question of fact, that fact must be made an issue by the pleadings in order to be litigated, and as the fact is decided so is the question of jurisdiction determined (*Matter of City of Mount Vernon*, 34 Misc. Rep. 225). If such issue be not presented by the pleadings evidence thereon would have to be excluded for irrelevancy. The fact of residence is often a difficult and close one and could not be litigated without notice and preparation.

Moreover, the denial in the answer of the allegation of residence in the complaint was not good, viz., it was "on information and belief" of any knowledge or information sufficient to form a belief.

The evidence on the trial was also sufficient to uphold the finding of the jury that the plaintiff was a resident.

The judgment should be affirmed.

Present — WOODWARD, JENKS, HOOKER, GAYNOR and RICH, JJ.

RICH, J.:

I concur in the result, but cannot assent to the proposition that non-residence must be pleaded. The defendant is a foreign corporation, and upon this appeal contends that Mrs. Ubart was a non-resident of this State at the time this action was commenced and that the trial court was, therefore, without jurisdiction. Counsel urges that it was incumbent upon the plaintiff to show by a preponderance of the evidence that the domicile of John Ubart (the husband) was in the State of New York at the time the action was commenced. The complaint alleges that the plaintiff was at the time of the commencement of the action a resident of the State of New York. The answer consists of a single paragraph as follows: "And now comes the defendant above named and * * * answers the complaint of the plaintiff above named and thus answering: I. On information and belief, denies any knowledge or information sufficient to form a belief as to the truth of any of the

allegations of paragraphs 'I' and 'III' of the complaint herein." It is true the answer is bad as a denial and did not put in issue the residence of the plaintiff. (Code Civ. Proc. § 500.) But the defendant is not deprived of the right to object to the jurisdiction of the court at any stage of the action, and if it was made to appear that the plaintiff was a non-resident at the time of the commencement of the action, it became the duty of the trial court to refuse to proceed further and to dismiss the action, for it is not sufficient that a non-resident plaintiff should by service of process or in any other way obtain jurisdiction of a foreign corporation. Before such an action can be maintained there must be also jurisdiction of the subject-matter, which cannot be conferred upon the court by consent or stipulation of the parties and which is not waived by a failure of the defendant to allege non-residence of the plaintiff in its answer. (*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315.) The question of plaintiff's residence was dependent upon conflicting evidence and presented a question of fact for the jury, and their verdict must be sustained if there is sufficient evidence before them to justify their finding. I think the record discloses sufficient evidence to justify the conclusion that Mrs. Ubart was at the time of the commencement of her action a resident of the State of New York.

I vote to affirm, with costs.

Judgment and order unanimously affirmed, with costs.

ANTHONY SMITH, an Infant, by JAMES SOMERVILLE, His Guardian ad Litem, Respondent, v. THE F. WESEL MANUFACTURING COMPANY, Appellant.

Second Department, March 1, 1907.

Negligence— injury by planing machine— when danger not obvious.

The danger of injury from the exposed cutting edges of the shaft of a planing machine which revolved, in an open space between covered rollers, so rapidly as to look like a smooth roller, is not obvious to a boy of nineteen years of age, who has only worked at the machine for two hours, and a recovery for injuries sustained is warranted, where he was directed to remove shavings collecting near the shaft without instructions.

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Under such circumstances, the fact that the plaintiff removed the shavings with his hand instead of with a stick is not contributory negligence as a matter of law.

APPEAL by the defendant, The F. Wesel Manufacturing Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 11th day of May, 1906, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 14th day of May, 1906, denying the defendant's motion for a new trial made upon the minutes.

John A. Straley for the appellant.

William J. McArthur [*Richard A. Rendick* with him on the brief], for the respondent.

GAYNOR, J. :

Assuming that the machine is correctly described in the opinion in *Crown v. Orr* (140 N. Y. 450), that case was not like this one. There the plaintiff was injured by having his hand caught in the revolving knives of the planing machine while he was replacing the hood on the top of the machine which covered the knives. The hood being off, the knives were fully exposed, and the danger of them obvious. Here the sets of rollers which are in front of and in the rear of the knives, and which draw the boards through, are covered by a front and a rear flap, both of which rise or open on hinges to expose the rollers in order to clean or care for them. They are down when the machine is in operation, but there is an open space between them about 4 or 5 inches wide extending across the top or table of the machine. This opening exposes a revolving shaft which also extends across the table, and is flush with the said flaps. It is about 4 inches wide and two inches thick, and its sharp metal edges shave the boards as they pass underneath it. It has no knives, but only these sharp edges, and in its swift revolution of about 3,000 a minute it looks like a smooth roller. It throws the shavings out to the rear through the said open space, and they keep accumulating, more or less, at the opening. The plaintiff was brushing them away with his hand on direction of the man whom he was assisting when it was caught by the revolving shaft and taken off. The learned trial judge charged that if the

danger was obvious the plaintiff could not recover, but if not that he should have been instructed of it. It is not altogether plain that the danger was obvious to a boy of nineteen, which the plaintiff was, who had only worked at the machine two hours, and who was removing the shavings for the first time. The jury did not think it was after hearing the evidence and inspecting the machine, which was also exhibited to us. That he used his hand instead of a stick was not negligence as matter of law for the same reason.

The judgment should be affirmed.

Present — JENKS, HOOKER, GAYNOR, RICH and MILLER, JJ.

Judgment and order unanimously affirmed, with costs.

CARL J. CARLSON, Respondent, v. JACOB ALBERT, Appellant.

Second Department, March 1, 1907.

Pleading — when causes should be separately stated.

A complaint for sums due the plaintiff on a breach of contract of service and for damages caused by the breach sets out two causes of action, which should be separately stated.

APPEAL by the defendant, Jacob Albert, from an order of the County Court of Kings county, entered in the office of the clerk of the county of Kings on the 26th day of January, 1907, denying the defendant's motion to compel the plaintiff to separately state and number the two causes of action set forth in the complaint.

J. Charles Weschler [*Sol Rothschild* with him on the brief], for the appellant.

Robert P. Beyer, for the respondent.

GAYNOR, J.:

The complaint contains two causes of action, viz., one for the amount due to the plaintiff on his contract of service for a year at the time of its breach by his discharge by the defendant, and the other for the damages caused by the breach. They are not one

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cause of action; the test is that a recovery on one of them would not bar an action on the other (*Perry v. Dickerson*, 85 N. Y. 345).

The order should be reversed and the motion granted.

WOODWARD, JENKS and RICH, JJ., concurred.

Order of the County Court of Kings county reversed, with ten dollars costs and disbursements, and motion granted, with costs.

WILLIAM S. HURLEY, Respondent, v. JEREMIAH ROBERTS, Appellant.

Second Department, March 1, 1907.

Practice — change of venue denied.

Where the answer contains a long and confusing statement of facts and the issues raised thereby are in doubt, the venue should not be changed for the convenience of defendant's witnesses as their materiality cannot be determined. Neither will the venue be changed for the convenience of possible witnesses to the facts alleged in a defective counterclaim, as their convenience is best served by leaving them at home.

APPEAL by the defendant, Jeremiah Roberts, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 17th day of September, 1906, denying the defendant's motion to change the place of trial from the county of Kings to the county of Rensselaer.

John F. Murray, for the appellant.

George Freifeld, for the respondent.

GAYNOR, J.:

The complaint alleges that the defendant agreed to deliver to the plaintiff 800,000 bricks in the city of Troy on or before May 12, 1906, but that he failed to deliver 144,250 thereof, to the plaintiff's damage \$288. A second cause of action is that the plaintiff overpaid the defendant \$190.50 on the contract.

Instead of meeting the complaint with a denial or denials, as the simple rules of pleading require (Code Civ. Pro. sec. 500), so that the issue could be readily seen, the answer is a long statement of facts, which has to be compared critically and patiently with the

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complaint to ascertain in what particular, if any, it differs therefrom. Near the end of the answer to the first cause of action the defendant "denies each and every statement" (meaning allegation) "contained in the first cause of action set forth in the complaint" (as though it could be set forth anywhere else) "not herein specifically admitted or denied," and there is a similar denial to the second cause. These are the only denials, except of any damage, or sum owing. The defendant's attorney evidently regards every allegation of fact which differs with the allegations of the complaint as a "specific" denial, and throws upon the court the work of picking out such allegations, pen in hand. The learned judge below must have been in much doubt in respect of what issues the defendant understands are to be tried and intends to try, and of course he could not see whether proposed witnesses were material without understanding this. In addition to this there is a so-called counterclaim which is not complete in itself, and is no counterclaim, which the defendant's list of witnesses or some of them are to be called to prove. As the defendant can serve their convenience by leaving them at home, the venue does not need to be changed on their account.

The order should be affirmed.

JENKS and MILLER, JJ., concurred; HIRSCHBERG, P. J., and RICH, J., concurred in result.

Order affirmed, with ten dollars costs and disbursements.

CATHERINA HAGGBLAD, as Administratrix, etc., of JOHN HAGGBLAD, Deceased, Appellant, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Respondent.

Second Department, March 8, 1907.

Negligence—injury by fall of hoist—res ipsa loquitur—Labor Law construed.

Section 18 of the Labor Law, regulating scaffolding, hoists, stays, etc., and prohibiting the use of such appliances if not so constructed as to give proper protection to persons employed, makes the master liable for the use of such appliances even though they be negligently put up by fellow-workmen of the servant injured.

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A plaintiff suing to recover for an injury to a decedent from such a cause need not plead the statute in order to make the same available.

When a structure used for the purpose of hoisting beams to an elevated railway falls and an employee is killed thereby, the case is brought within the doctrine of *res ipsa loquitur*, and the question of the defendant's negligence should be submitted to the jury, although the decedent helped his fellow-workmen to fasten the hoist in place.

APPEAL by the plaintiff, Catherina Haggblad, as administratrix, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 18th day of June, 1906, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case after a trial at the Kings County Trial Term.

The defendant was building a passenger platform on one of the stations of its elevated railroad. Long ties were being placed across the railroad track on the longitudinal girders of the railroad structure, on which the ordinary railroad ties rest at each end, so that they should extend out four feet from the longitudinal girder on the outer side of the track, and along such projecting ends of the ties a flooring was to be laid for a platform. There are heavy timbers called guard rails laid along each side of the track over the ties, to keep the car wheels from running off the track. In order to set these long ties they had to be swung by a block and fall along the outside of the railroad structure, and then thrust in and across the track between the longitudinal girders and such guard rails, leaving the ends sticking out four feet, as already stated. To do this a framework structure called a hoist was used to serve the office of a derrick, *i. e.*, the block and fall was suspended from it. This hoist rested on such extended ends of the ties and was fastened and braced thereto to hold it upright and in position. It was regularly shifted forward and fastened anew as the work progressed. It broke from its fastenings and fell over into the street from the suspended weight of a tie, and killed the plaintiff's decedent, who was one of the defendant's workmen doing the work. He helped to fasten the hoist in position, *i. e.*, drove some of the nails. It was claimed by the plaintiff that the system or method of fastening and bracing the derrick was not a safe, sufficient or scientific one. The plaintiff was nonsuited at the close of her case on the ground that the defendant was not guilty of negligence, and that the negligence

of the deceased and his fellow-workmen, who included a foreman in charge, caused the accident.

Frederick S. Martyn, for the appellant.

I. R. Oeland [*George D. Yeomans* with him on the brief], for the respondent.

GAYNOR, J.:

Section 18 of the Labor Law (Laws of 1897, chap. 415) provides that the employers of persons to labor "shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged." It was, therefore, a question of fact for the jury whether the defendant's method or system of placing and securing the hoist was a safe one. The plaintiff did not devise such method; he only helped in carrying it out. It was for the employer to adopt a safe method or system, and that duty could not be evaded by delegation. Not only is the said statute in the way of such delegation, but that was the rule before the statute was passed. And the fall of the hoist while being properly used for the purpose for which it was set up was of itself evidence that it was unsafe, and brought the case within the maxim that the thing speaks for itself (*Stewart v. Ferguson*, 164 N. Y. 553).

The objection that the statute cited in the foregoing was not available for not being pleaded in the complaint is founded on a mistaken notion. It did not need to be pleaded; it would not be scientific to plead it. The cause of action is not on a statute. All that the statute does is to make the employer liable for unsafe scaffolds, hoists, etc., even though they be negligently put up by fellow-workmen of the plaintiff as part of their work, whereas before the statute he was not; in other words, it makes evidence competent to show his negligence which was not competent before.

The judgment should be reversed and a new trial granted.

WOODWARD, JENKS and RICH, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

THE VILLAGE OF WHITE PLAINS, Respondent, v. THE TARRYTOWN,
WHITE PLAINS AND MAMARONECK RAILWAY COMPANY, Appellant.

Second Department, March 8, 1907.

**Nuisance — party — village may sue to enforce order of board of health
— pleading — when complaint insufficient.**

A suit to enjoin the violation of an order of a village board of health to abate a nuisance and to enforce the same is properly brought in the name of the village instead of that of the board of health.

But in such action it is not enough to allege and prove that the board of health declared a nuisance and ordered it abated; the complaint must allege facts showing the nuisance, and the resolution and order of the board of health are not evidence thereof. A complaint failing to state such facts is demurrable.

APPEAL by the defendant, The Tarrytown, White Plains and Mamaroneck Railway Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 23d day of July, 1906, upon the decision of the court, rendered after a trial at the Westchester Special Term, overruling the defendant's demurrer to the complaint.

This is a suit to enjoin a violation of an order of the board of health to abate a nuisance, and enforce the same.

A. N. Johnson [*Frank H. Richmond* and *Henry A. Robinson* with him on the brief], for the appellant.

Henry R. Barrett [*H. T. Dykman* with him on the brief], for the respondent.

GAYNOR, J.:

This suit is properly brought in the name of the village instead of in that of the board of health (*Board of Health v. Magill*, 17 App. Div. 249); but the complaint does not state facts sufficient. Section 21 of the Public Health Law empowers local boards of health to make and publish general orders and regulations for the preservation of life and health, and also orders and regulations not of general application for the suppression of particular nuisances, and to maintain suits in the name of the municipality to restrain by injunction violations of such orders and regulations and to enforce the same. The complaint alleges that the board of health of the village after

a hearing to the defendant passed a resolution declaring the vibrations of its engines and dynamos in its electrical power house a nuisance and a cause of danger and detrimental to the health of a large number of inhabitants of the village, and ordering it abated; that a copy thereof was served on the defendant, and a demand made of it by the board to comply therewith, but it refused.

There is then an allegation that the said vibrations are a nuisance and a cause of danger and detrimental to the health of a large number of the inhabitants of the village; but there is no allegation of any noise or jar therefrom, much less of any extending beyond the power house. No fact is alleged to show a nuisance. The complaint is framed on the theory that it is enough to allege and on the trial prove that the board of health has declared a nuisance and ordered it abated. This is erroneous. Its resolution and order were in no sense an adjudication (*People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1). The complaint must allege facts constituting a nuisance, and such resolution and order are not evidence thereof.

The judgment should be reversed and the demurrer sustained with leave to the plaintiff to plead over.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, J.J., concurred.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to plead over on payment.

EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Respondent,
v. FRANKLIN H. KALBFLEISCH COMPANY, Appellant.

Second Department, March 8, 1907.

Pleading — improper joinder of actions on contract and in tort.

A cause of action for damages for the breach of a contract and a cause of action for damages for fraud in inducing the plaintiff to make it are inconsistent with each other and cannot be united in the same complaint under subdivision 9 of section 484 of the Code of Civil Procedure. An election between such inconsistent causes is required.

APPEAL by the defendant, the Franklin H. Kalbfleisch Company, from an interlocutory judgment of the Supreme Court in favor of

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the plaintiff, entered in the office of the clerk of the county of Kings on the 10th day of July, 1906, upon the decision of the court, rendered after a trial at the Kings County Special Term, overruling the defendant's demurrer to the complaint.

James W. Prendergast [*James C. Bergen* with him on the brief], for the appellant.

L. B. Grant, for the respondent.

GAYNOR, J. :

Stripping this complaint of its verbiage and making it lean, we find a cause of action for damages for breach of the contract, and another for damages for fraud in inducing the plaintiff to make it. They are not "consistent with each other", and therefore cannot be united in the same complaint under subdivision 9 of section 484 of the Code of Civil Procedure; and that is the only authority for uniting a cause of action on contract with one in tort. To assert one is to negative the other, and the plaintiff has to elect which he will sue on. He cannot sue on both.

The judgment should be reversed.

HIRSCHBERG, P. J., WOODWARD, RICH and MILLER, JJ., concurred.

Interlocutory judgment overruling demurrer to complaint reversed, with costs, and demurrer sustained, with costs, with leave to the plaintiff to plead over on payment.

MARY R. MORONEY, Respondent, v. THE CITY OF NEW YORK,
Appellant.

Second Department, March 8, 1907.

Negligence—municipal corporations—injury to pedestrian on defective sidewalk—judgment for plaintiff affirmed.

Although the fact of the happening or non-happening of previous accidents on an alleged defective sidewalk may bear upon the character of the defect and on the question of notice to the municipality, the fact that other persons escaped injury does not excuse the municipality from allowing the defect to continue.

Thus, where the plaintiff has shown that she suffered a fall and injury by reason of her toe catching in a hole under a flagstone which projected about two inches above the adjoining stone, and that said condition existed for more than a year, the question of the defendant's negligence should be submitted to the jury, although the plaintiff gives no proof of a prior accident, and the defendant's witnesses state that they had no knowledge of the defect.

Although the distance which one stone was raised above the other was not of itself negligence, yet, when there is a hole thereunder sufficiently large to catch and hold a foot, the question of negligence should be submitted to the jury.

GAYNOR and RICH, JJ., dissented, with opinion.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 21st day of February, 1906, upon the verdict of a jury for \$500, and also from an order entered in said clerk's office on the 19th day of March, 1906, denying the defendant's motion for a new trial made upon the minutes.

James W. Covert [*James D. Bell* and *John J. Delany* with him on the brief], for the appellant.

Elmer S. White, for the respondent.

Judgment and order affirmed, with costs, on the opinion of Mr Justice KELLY at Trial Term.

HIRSCHBERG, P. J., WOODWARD and MILLER, JJ., concurred; GAYNOR, J., read for reversal, with whom RICH, J., concurred.

The following is the opinion of Mr. Justice KELLY delivered at Trial Term:

KELLY, J.:

The plaintiff sued to recover damages sustained, as she alleged, through the negligence of the defendant in failing to keep the sidewalk in reasonably safe condition. She testified that while walking east on the north side of Forty-first street, in the borough of Brooklyn, on the evening of November 3, 1903, the tip of her right shoe caught under a projecting flagstone, causing her to fall. Her evidence was that the shoe was caught so that it required some force to remove it. She was corroborated by her husband, who was with her. A witness, living on the opposite side of the street, saw

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her fall. There is no substantial dispute as to the condition of the flagging. It was made of some patent substance, and at the place where the plaintiff caught her foot two of the artificial flagstones joined. They were laid by different makers at different times, and the upper or easterly stone was, as plaintiff claimed, two inches, and as defendant concedes, one and three-quarter inches above the lower. This condition had existed for more than a year. Defendant's policemen and other witnesses testified that they had no knowledge of the hole or space under the higher flagstone in which plaintiff's shoe was caught. Photographs were introduced in evidence which plaintiff averred showed the existence of the hole, and which defendant insisted showed that the alleged defect consisted simply in the elevation of one stone over the other for the space indicated. The claim was presented to the city at a time when the flagging remained in the condition in which it was on the night of the accident, but no investigation appears to have been made as to the existence of the hole. Therefore, on this trial, we have the positive statement of plaintiff and her witnesses met by the negative testimony of the city from witnesses who say they never saw the hole or space.

Whether the condition claimed by the plaintiff raised an issue as to whether the walk was reasonably safe was vigorously contested by the corporation counsel. He insists that the court should say as matter of law that the defect was not such as to warrant a finding by the jury that the situation was likely to result in accident. No evidence was introduced of previous accident occasioned by pedestrians catching their feet in the hole or space under the flagging, and it was conceded that the street was a regularly paved street, built upon and used by the public.

Is this a case requiring the court to submit the question whether the highway is in reasonably safe condition to the jury? The absence of evidence of previous accident is important. Of course, a condition not intrinsically unsafe which has uniformly proved sufficient and safe is not changed to one insufficient and unsafe simply because one out of hundreds or thousands meets with an accident in encountering it. The policemen called by the city testified that they had passed over this uneven condition of sidewalk repeatedly and had never heard of or anticipated accident or danger from it. When reasonable men may differ as to whether or not the

condition was such as to call on the city officials to anticipate accident, the question is for the jury. (*Beltz v. City of Yonkers*, 148 N. Y. 67.) Is this such a case? The Court of Appeals has decided that minor defects and irregularities in sidewalks are not such defects as will justify the submission of the question to the jury, because no street can be made and maintained in absolutely perfect condition; and the court decided as matter of law in the *Beltz* case that a depression of two and one-half inches was not dangerous. In *Hamilton v. City of Buffalo* (173 N. Y. 72) a depression of four inches in a sidewalk was held not to be dangerous as matter of law. Judge VANN, in his dissenting opinion, expresses doubt as to the line separating the question as one of law from the question of fact. This difficulty is always presented in this class of litigation. Here we know an accident happened; there is no suggestion of contributory negligence, and the jury have apparently found that a hole or space existed into which the toe of the pedestrian's boot entered and was held fast. They have found that she told the truth when she stated specifically that she did not "trip" over the irregularity in the stone, but that her fall was caused by her foot catching in the hole and being held fast. Now, I am free to say that if the question of reasonable safety is to be determined alone by the dimensions of the hole, depression or irregularity in the sidewalk, then this space was not as large as the depression in the *Beltz Case* (*supra*), in *Getzoff v. City of New York* (51 App. Div. 450) nor in *Corson v. City of New York* (78 id. 481), in each of which actions the appellate courts decided that the condition did not present a case for submission to the jury. It is true also that there is no evidence of previous accident, but while this is an important fact I think it is to be submitted to the jury for consideration in determining the main question — was the situation reasonably safe? I do not think it is decisive, because, if the situation was unsafe, it would be manifestly unjust to deny relief to the first person who was unfortunate enough to suffer from it. It would be in effect likening the case to one where an animal, usually gentle and good-tempered, suddenly manifests evil qualities. It is said that a dog "is entitled to one bite" before his owner is to be held liable. The learned corporation counsel urges that this principle is to be applied as between persons injured on the highway and the municipal corporation con-

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trolling the street, and it is said that the Appellate Division in this department has in effect so decided in the *Corson Case* (*supra*). I do not so interpret the decision. The fact of the happening or non-happening of previous accidents may bear on the character of the defect and on the question of notice to the municipality. Where a situation is not unsafe in itself it may be continued without imputation of negligence. But where the condition is unsafe, the fact that individuals may fortunately escape injury is no excuse for its continuance. In the case at bar the jury was told that if the accident was occasioned simply by reason of the fact that one stone was elevated over the other, simply because she tripped she could not recover; and that it was only in case they found that the aperture or hole existed and caught plaintiff's foot, holding it fast and causing her to fall, that this condition was not reasonably safe and that it had existed for the time charged; only on proof of these facts were they justified in deciding that the sidewalk was not reasonably safe. I am not prepared to say that a hole or aperture in a sidewalk into which the toe of a pedestrian's shoe may pass sufficiently far to hold the foot fast, requiring force to remove it, is such a minor defect that reasonable and prudent men will not differ as to whether accident should have been reasonably anticipated from its continuance.

The jury have found the facts in favor of plaintiff, and I think the verdict must stand. Motion denied.

GAYNOR, J. (dissenting):

The action was for damages to the plaintiff by a defect in a sidewalk. The testimony for the plaintiff of the defect is as follows:

The plaintiff testified that as she was walking with her husband after dark "my foot caught under a flagging and threw me." She did not examine the defect then, but did after she got well, but does not say what it was or describe it. She says on cross-examination that she could not get her foot out after she fell, her husband had to pull her foot out from under the flagging in order to lift her up, it was held fast there "for several moments." In her preliminary examination when she filed her claim against the city she says she went back and examined the defect the night of the accident. The testimony of another witness that the plaintiff was out in the street next day, and called on an acquaintance, is not disputed. Her hurt

was not great. A woman who lived opposite testified that she saw the accident from her side; that where the sections of the sidewalk met one side was "some" $2\frac{1}{2}$ or 3 inches higher than the other, and the edge broken off some here and there; she could not tell what the material of the sidewalk was; "I did not particularly look at it," she says; her observation and estimate was made by looking from across the street, and "by passing there several times" — on which side is left to inference. The plaintiff's husband testified that he went back and examined the defect next day; that one flag was "about" 2 inches higher than the other; "and there was a couple of jagged edges where a person could put their foot under where the edge of one met the edge of the other;" that the sidewalk was of concrete; that "the judgment I have given to the court and jury as to the difference in the point of elevation is a surmise from simply an inspection and examination with the eye." No measurements were made by the plaintiff or any witness for her.

The evidence for the defendant was as follows:

A civil engineer was sent to examine the defect after the accident; by his actual measurements one section at the joint ran from $1\frac{1}{4}$ to $1\frac{1}{2}$ inches higher than the next section; at the edge small pieces were jagged or chipped off. Three other witnesses and two policemen who took no measurements testified that the rise was about 1 to $1\frac{1}{2}$ inches. No one mentions any hole.

The verdict was against the weight of evidence. That of the plaintiff and her husband of her foot being cast in a hole under the sidewalk for several minutes, so that he had to pull it out in order to lift her up, is an obvious exaggeration. There is no evidence of such a hole. Even the husband's, that the top of one flag was "about" 2 inches higher than the next one (which he says is a surmise) is inconsistent with it; and the wife does not describe the defect at all. The statement of the husband that one could get his foot "under where the edge of one met the edge of the other" is a mere conclusion and not evidence. The other witness for the plaintiff mentions no hole. The plaintiff could have had measurements taken by a competent and trustworthy person, but did not. The evidence of the civil engineer who did make accurate measurements should outweigh all surmises and loose testimony, if credible, and there is no reason to say it is not. The evidence that one flag appeared to

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be "about" or "some" 2 or 2½ inches higher than the other is consistent with the accurate evidence that the elevation was 1½ or 1¾ inches, and cannot be permitted to outweigh it. Moreover, the photograph shows that there was no hole at all.

A verdict should have been directed for the defendant at the close of the case. The evidence in its entirety showed that the defect was too slight to base a charge of negligence on against the city. (*Butler v. Village of Oxford*, 186 N. Y. 444). No rule of perfection can be applied to a municipal corporation any more than to any one else. This world is not perfect and the affairs of men are not held to such a rule. There are many places in the streets where one may stub his toe which are not negligent defects, and on private property, also.

The judgment and order should be reversed.

RICH, J., concurred.

SADIE BRENNAN, Respondent, v. THE CITY OF NEW YORK,
Appellant.

Second Department, March 15, 1907.

Negligence — municipal corporations — fall of pedestrian on icy crosswalk — judgment for plaintiff reversed.

When a pedestrian who is injured by a fall on the street complains only that there was ice on the crosswalk, and the case is tried upon that theory, and it is shown that her fall was caused by slipping off the sidewalk at the curb to the icy crosswalk, the slip on the sidewalk is the proximate cause of the injury and the case should not be given to the jury.

Moreover, when no defect or obstruction on the crosswalk is shown other than a temporary condition of ice and snow caused by the weather conditions, a municipality which worked diligently to remove the snow is not chargeable with negligence for failing to completely clear the street.

The rule is different where ice and snow have been allowed to accumulate at a particular spot for a considerable length of time until it becomes an obstruction and dangerous to pedestrians.

WOODWARD, J., dissented, with opinion.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of

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March, 1906, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 5th day of April, 1906, denying the defendant's motion for a new trial made upon the minutes.

James W. Covert [*James D. Bell* and *William B. Ellison* with him on the brief], for the appellant.

Robert Stewart, for the respondent.

GAYNOR, J.:

The plaintiff testified that she slipped on the curb at the corner of two streets and fell on the cross-walk; that she could not balance and save herself on the cross-walk on the ice and snow there, of which she gives no description. The first of her three witnesses to the accident says he saw her "slip off the sidewalk," try to balance herself in the gutter and fall on the cross-walk; and that the sidewalk and cross-walk were "icy," had "trodden down snow" on them, "packed snow" about "an inch or two thick," and that she fell thereon. The next says substantially the same as to the place and manner of her slip and fall; and he describes the cross-walk only as having trodden snow on it, "and the cold weather froze it right over, formed ice." The last saw the plaintiff as she fell on the cross-walk two feet in front of him on what he finally calls "frozen snow." He says nothing of her slipping from the curb.

No one but the first witness says there was packed or frozen snow or ice on the sidewalk. The complaint only alleges they were on the cross-walk, and the case was tried on that basis. The accident happened at about half after 8 o'clock Tuesday evening, February 16th. The official weather report showed that it had snowed from 8:12 A. M. to 8:28 A. M. and from 10:45 A. M. to 2:13 P. M. on Sunday, and from 7:14 P. M. Sunday to 3 A. M. Monday. On Monday the temperature ranged from 34 to 24, and on Tuesday from 12 to 1, above zero.

The evidence was insufficient to go to the jury. In the first place, the proximate cause of the plaintiff's fall was her slip on the sidewalk, of which no allegation of negligence is made. She might have fallen if there had been no snow on the cross-walk. To say she would not would be speculation. In the next place, there was no defect or obstruction on the cross-walk, within the meaning

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of those terms. There was nothing there other than the natural temporary condition caused by the weather for the time being. With the constant alternations from rain to snow, from thawing to freezing, in this trying climate of ours in the winter, such a condition of the streets of a city is inevitable and not chargeable to the city. Cities have a duty to keep the streets free of dangerous defects and obstructions, but such condition is neither.

Evidence was given for the defence showing that the city's street force had worked diligently after the snowfall to remove the snow from the streets, including the locality where the plaintiff fell. The learned trial judge refused to charge as requested by the learned counsel for the city that if such employes did all they could after Sunday to clear the street where the accident happened of snow the verdict must be for the city. The exception to such refusal was well taken; otherwise the city is liable, however diligent. But with several hundred miles of streets to take care of, a city cannot clear them of every fall of snow or covering of ice, nor is it required to try to, for if it snow or freeze to-day it will rain or thaw to-morrow or soon, and the city may await that event. (*Taylor v. City of Yonkers*, 105 N. Y. 202.) There is reason in all things. To employ men enough to keep the streets free at all times of snow and ice would be an expence that cities could not bear, and they are not required to. The question exists only in such climates as we have here. After snow storms the city cannot be expected to do more than open the streets to travel; they cannot clean them of all snow or water, and prevent them from being more or less slippery. Nor could snow and slush be kept off the cross-walks unless the entire street were cleared of them; every passing horse and vehicle would spread them there. Indeed, in order to use sleighs, as is the case in many cities, the snow is and has to be left on the cross-walks.

The accumulation of snow and ice at a particular spot by regular accretions for a considerable length of time until it becomes an obstruction, dangerous to passers-by, is very different to the present case.

The judgment and order should be reversed.

HIRSCHBERG, P. J., RICH and MILLER, JJ., concurred; WOODWARD, J., read for affirmative.

WOODWARD, J. (dissenting):

The defendant concedes that on the evening of February 16, 1904, between half-past eight and nine o'clock, the plaintiff, in passing along Bridge street, in the borough of Brooklyn, and after she had reached the crosswalk at Bridge and Nassau streets, fell and, as alleged, sustained injuries as a result thereof. There was evidence which justified the jury in finding that upon this crosswalk there was an accumulation of snow trodden into icy formations, leaving the surface rough and uneven; that this general condition had existed for several days; that a fall of snow commenced on Sunday, the fourteenth, lasting from eight-twelve A. M. to eight-twenty-eight A. M., and from ten-forty-five A. M. to two-thirteen P. M., and from seven-fourteen P. M. to three A. M. of Monday, the fifteenth, and this accident occurred between half-past eight and nine o'clock in the evening of the sixteenth, so that two full working days intervened between the last fall of snow and the accident, and there was evidence to show that the defendant had made its own standard of reasonable care at this point by providing men and appliances to remove the snow as fast as it fell, or as nearly so as possible. The crosswalk at Bridge and Nassau streets is in use by large numbers of people. It is a point where the degree of care required to insure the safety of people lawfully using the highway is much higher than it would be in less congested localities or in small cities like Yonkers, and if the jury believed the plaintiff's evidence, that the defendant, though requiring the removal of all snow at this point practically as fast as it fell, had so far neglected this duty as to permit the snow to accumulate and reach an icy and dangerous condition, and to remain in this condition from three o'clock in the morning of the fifteenth to eight-thirty or nine o'clock in the evening of the sixteenth, I am of opinion that the verdict was justified.

This is not the case of an icy sidewalk, where the duty of cleaning the same is imposed upon adjacent property owners, and where the duty of the city is that of supervision and ultimate liability, but is the case of the city itself assuming the duty of keeping the crosswalks in a reasonably safe condition, and neglecting that duty as it has itself construed it. It has, by its own acts, said that the safety of the public at this point required the immediate removal of falling snow, and the evidence shows that while there were men employed

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in this work, it was done so negligently that the plaintiff slipped and fell upon the formation two whole working days after the last fall of snow, and it does not appear that this snowfall was accompanied by sleet or by any unusual conditions, and the entire precipitation from the fourteenth to the fifteenth was but two and four-tenths inches. The evidence would seem to indicate that the snow and ice had previously accumulated, and that the snowstorm of the fourteenth and fifteenth had simply exaggerated this condition.

This case is entirely different from *Taylor v. City of Yonkers* (105 N. Y. 202) and those which have followed it. In those cases the accident occurred upon sidewalks where the primary duty of removing the snow was upon the abutting property owners, and the weather conditions and the surroundings were entirely different from those of the case at bar. In the *Taylor Case* (*supra*) on the night preceding the accident rain fell which washed the sand from the ice, and then froze, covering everything with a new surface, and making the whole city slippery and dangerous for travel, and the court very properly held that under such circumstances the municipality was not liable. But in the case at bar there appears to have been a light fall of snow, lasting from about eight o'clock on the morning of February fourteenth to three o'clock on the following morning, and on the evening of February sixteenth the plaintiff fell upon an accumulation of snow, trodden into icy formations, and was injured, and this at a point where the city had itself established the standard of reasonable care to require the immediate removal of the snow.

I vote for affirmance.

Judgment and order reversed and new trial granted, costs to abide the event.

HENRY ALLAN PRICE, Appellant, v. PRESS PUBLISHING COMPANY,
Respondent.

Second Department, March 15, 1907.

**Contract for services — no consideration for additional compensation —
Statute of Frauds — evidence.**

Under a written contract of employment for three years by which plaintiff was to act as a journalist "in whatever position he may be assigned from time to time," at a salary "not less than" certain stated sums in each successive year, an oral promise by the employer to pay a bonus at the end of the term, if the plaintiff will fulfill his contract, is void for lack of consideration.

Moreover, when the oral contract to pay said bonus was made more than one year before the expiration of the plaintiff's term, it is void under the Statute of Frauds as not to be performed within one year from the making thereof.

The Statute of Frauds creates a rule of evidence, and a void oral contract cannot be proved.

APPEAL by the plaintiff, Henry Allan Price, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 7th day of June, 1906, as resettled by an order entered in said clerk's office on the 25th day of June, 1906, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term.

The state of the evidence was as follows:

By a written contract dated October 20th, 1902, between the defendant and B, the plaintiff's assignor, the latter bound himself to work for the defendant on its newspaper as a journalist for three years from that date "in whatever position he may be assigned from time to time" by the defendant, giving "his entire time, ability, energy and professional skill;" and the defendant employed him for that period, and agreed to pay him "not less than" \$9,000 the first year, \$10,000 the second and \$11,000 the third.

B was the only witness called. He testified that he informed the president of the defendant in June, 1904, that he had entered into a contract to go into the service of another newspaper at the end of his service with the defendant, that he intended to stay out his contract with the defendant, that he would not break it, but asked him to release him from it, as it would be a loss of \$10,000 to him to carry it out; that the said president told him (in sub-

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stance) he would lose nothing by staying, that a bonus of \$10,000 would be given him by the defendant at the end of his service.

B served out his time, and this action is to recover the said \$10,000.

Martin W. Littleton, for the appellant.

John M. Bowers [*Manfred W. Ehrich* with him on the brief], for the respondent.

GAYNOR, J. :

This judgment should be affirmed. There was no consideration for the agreement to pay the additional \$10,000 at the expiration of the term of service, the promisee being already bound by the written contract to serve for the time and the yearly salaries therein fixed (*Tolhurst v. Powers*, 133 N. Y. 460; *Arend v. Smith*, 151 id. 502).

There is no room for the claim that the doubtful meaning of the contract (if it were doubtful) in respect of the amount of the salaries to be paid ("not less than," being the phrase) furnished a consideration for the new agreement as a settlement of a dispute. It suffices that it was made on no such basis. On the contrary, the employe claimed no right to an increase of salary, and assured the defendant's president in advance that he did not intend to quit service under the contract. To keep him from quitting unless his salary were raised was therefore not the consideration for the new agreement.

The new agreement being oral was also void under the statute of frauds, for that it was not by its terms to be performed within one year from the making thereof. It was made in June, 1904, and was not to be performed until October 20th, 1905. If it could be said that the employe performed under it, it would be void just the same. If he would have any right of action it would not be on the void agreement, but on a *quantum meruit* (*Erben v. Lorillard*, 19 N. Y. 299). The statute of frauds creates a rule of evidence, and he could not prove the new agreement at all for lack of writings. Cases where the contract was carried out by both sides, like *Kramer v. Kramer* (90 App. Div. 176), have no application here.

That the terms of the written contract are that the plaintiff's assignor was to be paid "not less than" the salaries specified in such contract, presents no different case. Those were the salaries to be paid unless the parties agreed upon larger ones, and such new agreement would still have to be a valid one under the statute of frauds.

The judgment should be affirmed.

Present—HIRSCHBERG, P. J., WOODWARD, GAYNOR, RICH and MILLER, JJ.

Judgment unanimously affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE LODES,
Respondent, v. THE DEPARTMENT OF HEALTH OF THE CITY OF
NEW YORK, Appellant.

Second Department, March 15, 1907.

**Constitutional law—municipal corporations—revocation of license to
sell milk in the city of New York.**

(Per GAYNOR, J., HIRSCHBERG, P. J., and HOOKER, J.): The board of health of the city of New York cannot, without notice and a hearing, revoke the license of a milk vender because he has been convicted in the criminal court of the offense of selling adulterated milk.

(Per GAYNOR, JENES and WOODWARD, JJ.): Even when it is within the power of the Legislature to disqualify one from continuing in a particular business and to revoke a license, and when it may delegate such powers to a municipality, the latter can enforce no ordinance or regulation which it has not previously enacted, and when the selling of adulterated milk has been made punishable as a misdemeanor by municipal ordinance, an offender is subject only to the penalty prescribed and his license cannot be revoked.

(Per GAYNOR, J.): The "practice" or custom of the board of health to revoke licenses of such offenders is not an ordinance of the board or municipality.

A statute, general or local, for the taking away of a constitutional right by any process of a judicial nature is void unless it require a notice and hearing.

The Legislature itself is without power to prohibit the following of ordinary occupations. At the most it may only *regulate* such occupations under the police power.

The Legislature can no more confer power on the judicial than on the executive department to arbitrarily refuse or revoke a license to carry on any of the ordinary occupations of life.

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Occupations which are inherently dangerous or annoying to the community, or pertain to the public service, or which are in the nature of privileges instead of rights, may be totally or partially prohibited under the police power. Other occupations, though they may not be prohibited, may yet be regulated for the general safety, welfare and comfort, which regulation may be effected by requiring permits or licenses. But the power of the board of health to require licenses neither implies nor carries with it the power to revoke such licenses at will unless the power be conferred by express words or necessary implication.

(Per JENKS and WOODWARD, JJ.): The board of health of the city of New York has power to enact an ordinance of general application to the effect that a license to sell milk shall be revoked if the holder be convicted in the courts of selling adulterated milk, nor need such ordinance provide that notice be given after the conviction and before revocation.

APPEAL by the defendant, The Department of Health of the City of New York, from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Kings on the 17th day of May, 1906, granting the relator's motion for a peremptory writ of mandamus requiring the board of health of the city of New York to rescind its summary revocation of the relator's permits to carry on the business of selling milk at retail at his place of business and by wagon in the said city, which revocation was made without notice or hearing and under which the relator's permits were forcibly taken from his possession by a policeman under the order of said board.

Edward H. Wilson [*James D. Bell* and *John J. Delany* with him on the brief], for the appellant.

Albert R. Moore, for the respondent.

GAYNOR, J. :

What is called the sanitary code of the city of New York is made up of health ordinances adopted from time to time during a course of years by its board of health (Laws of 1873, ch. 335, sec. 82); and the charter of the new city enacted that this code, to the extent that it was then "in force," was and should continue to be binding and in force in the new city (Laws of 1897, ch. 378, and of 1901, ch. 466, sec. 1172). Any violation thereof is made a misdemeanor by the said charter section. Section 56 of the said sanitary code is as follows :

"No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit from the Board of Health and subject to the conditions thereof."

The revocation of the relator's permits, and the refusal to permit him to sell milk thereafter, was on the ground that he and some of those who work for him were convicted in a criminal court of selling milk which was below the standard fixed by another section of this sanitary code; and the opposition to the granting of the writ is put on that ground alone, *i. e.*, that the board of health has the power to disqualify a person from selling milk for his conviction in a criminal court of a violation of its ordinances fixing the standard of pure milk.

The precise question presented is, therefore, has the board of health power to revoke the license of a milk vender for his being convicted in a criminal court of the offense of selling adulterated milk, and thereby and by refusing him a license thereafter inflict on him a forfeiture of the right or a penalty of disqualification to carry on that business.

1. — I suppose it is within the power of the state Legislature to pass an act to disqualify one to continue in a particular business, and to revoke his license therefor, as a penalty for his subsequent conviction of a violation of any law or ordinance regulating such business, as is done, for instance, in the statute for the licensing of master plumbers (Laws 1892, ch. 602, sec. 13); or, it may be enabling a municipal common council or other competent body to pass an act call it ordinance, by-law or rule, as you will, for there is nothing in the name) to the same effect. It suffices that there is no such (disqualifying act, state or local, in this case. Another section of this code of sanitary ordinances fixes the standard of milk to be sold, and the punishment prescribed by the Legislature for a violation thereof is, as we have seen, the general one for a misdemeanor, *i. e.*, a fine not exceeding \$500, or imprisonment not exceeding one year, or both (Penal Code, sec. 15). The board of health has prescribed no punishment; nor has any municipal authority. No penalty or sanction for the enforcement of ordinances can be resorted to except those previously prescribed by statute, or by a local ordinance authorized by statute (*Hart v. Mayor, etc., of Albany*, 9 Wend. 571; *Greater New York Athletic Club v. Wurster*, 19

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Misc. Rep. 443; Dillon on Munic. Cor. sec. 280—4th ed. sec. 346).

a. It is not necessary to now say whether the board of health has been given power by the Legislature to enact an ordinance prescribing such penalty of disqualification upon such conviction, and, if so, whether such grant of power be valid. It suffices that no such ordinance exists. It should not escape notice in passing, however, that the said charter section 1172 empowers such board to "provide for the enforcement of the said sanitary code by such fines, penalties, forfeitures or imprisonment as may by ordinance be prescribed." If this language had to be construed as purporting to give the board unrestricted power to prescribe punishments of the nature mentioned, it would mean that such board could prescribe the forfeiture of one's estate as well as of his occupation, and any length of imprisonment or weight of fine, if the Legislature be capable of delegating such transcendent powers of sovereignty. But it expresses no such legislative intention, for it expressly limits such punishments to such "as may by ordinance be prescribed," i. e., to such as there is power to prescribe by ordinance; and apart from the Legislature's power of delegation, the charter, as we have seen, sets limits to ordinance making on that head by making the offense of violating the said sanitary code a misdemeanor.

It has been suggested that there is such an ordinance (or "rule," as it is called, and that name is just as good if there be any who prefer it). This is based on an allegation in an affidavit read in opposition below, that "it is the practice of the board of health" to revoke the permits of persons twice convicted of selling adulterated milk, and to refuse permits to them thereafter, and that the board followed "this rule" in the present case. But the ordinances of the board of health have to be in writing and published like all statutes (sec. 1172, *supra*). There is no pretence that there is any such written "rule," by-law or ordinance. As to the "practice" of inflicting the penalty of disqualification, that is the very thing objected to as a usurpation of power.

b. Nor may we consider whether the Legislature may empower the board of health to revoke such a permit for cause after a hearing by it on notice, with or without a conviction in a criminal court, and by that fact disqualify the holder, for no such power has been

conferred ; or empower it to pass an ordinance for such revocation and disqualification by it after such notice and hearing, or without that judicial formality, for there is no such ordinance. But the subject cannot be even cursorily considered without remembering that either by the framework or the express words of the instruments constituting government throughout this country, government is divided into the three branches, legislative, executive and judicial, and the powers of government divided among these three branches according to their kind. To assign to an executive official or board the power to both make laws and judicially try and punish persons for their violation would therefore raise a most grave question. Nowhere is the fundamental principle of government that the powers of government, or of any two of the departments of government, cannot be united in any one department, better expressed than by this renowned section of the Massachusetts Bill of Rights, viz. :

“ In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them ; the executive shall never exercise the legislative and judicial powers, or either of them ; the judicial shall never exercise the legislative and executive powers, or either of them ; to the end it may be a government of laws and not of men.”

c. Such an ordinance, or state statute, would have to “ require ” a hearing on notice to be valid, for the right to follow any of the ordinary occupations of life is protected by the constitutional right of liberty and property, and therefore cannot be taken away except by judicial process, an essential ingredient of which is a requirement of a notice of trial (*Stuart v. Palmer*, 74 N. Y. 183).

2.— It follows that inasmuch as the board of health had no power to inflict such forfeiture and disqualification as a punishment, it had no power to inflict it at all ; unless, as is claimed, the bare power of the Legislature to the board of health to require a permit or license from it to sell milk, which is all that its said ordinance in terms does, carries with it inherently to the said board the power to arbitrarily refuse such permit to whom it will, and thereby prohibit such business to whom it will ; and that therefore a license or permit which might have been refused at will by such board in the first instance may be permanently revoked by it at will. Now, if

the Legislature has no power to directly prescribe that such license or permit may be granted or refused at will, it cannot be said that such power inheres in its grant of power to such board to require such license or permit; and thus the question whether the Legislature has such power is presented. If it has it not, then the board of health cannot have it.

Is it then indeed so that in this free government, saturated from the beginning with the very sap and juice of liberty, to borrow a phrase from a great constitutional writer (De Lolme on Brit. Const., 1853 ed., p. 20), we have already relapsed to that degree of arbitrary power that one may not engage in the usual and necessary occupations of life, the selling of milk, butter, eggs, butcher's meat, fish, tea, coffee, vegetables, fruit and so on (for they are all within the same principle and category), as matter of right, but only, as is the case in the few despotisms which still survive in the world, by the consent of government as matter of grace—such consent being revocable at will inasmuch as it may be refused at will? The making of such an assertion anywhere in the Anglo-Saxon world, ever an irritable body on questions of the rights of the individual, arouses instant challenge, for it strikes at the foundation of free government. The final judicial decision in this country in which such a claim shall be for the first time upheld will be momentous. It will mark the year in our history when free government had run its course with us and the decline to government paternalism or despotism, which cost past ages so much of blood and property to get rid of, set in. The learning and wide research of counsel have not been able to discover any actual decision which, read with true discrimination and application, supports such a claim. If there is to be such a precedent, we must make it this day.

a. The ordinary useful and necessary occupations of life—the usual occupations and businesses of citizens generally—are free to all men as of right, and may not be arbitrarily *prohibited* to any one who chooses to engage in them even by the Legislature, let alone by the executive or the judicial branch of government. They may only be *regulated*, which is a very different thing, and that only by the Legislature directly, or through power conferred by it. Such power to regulate them exists where the safety, welfare or necessary comfort of society requires such regulation. The power of

prohibition exists only in the case of occupations not included among such free and lawful ones. And what cannot be done directly cannot be done indirectly, *i. e.*, by requiring such free and lawful occupations to be licensed in order to be carried on and then allowing licenses to be refused at will or revoked at will. The constitutional guarantees of the rights of liberty and property to the individual include his right to follow any ordinary and usual business until he loses or forfeits it by due process of law (*Bertholf v. O'Reilly*, 74 N. Y. 509; *Matter of Jacobs*, 98 id. 98; *People v. Marx*, 99 id. 377).

b. It does not help the contention to the contrary to say that the power of executive officials to arbitrarily refuse or revoke such a license at will must be exercised reasonably, and is subject in that respect to judicial review. If that were so we should have the same case still, for the Legislature can no more confer such power on the judicial than on the executive branch of government. The courts must not forget that arbitrary power is not made lawful, although they may flatter themselves that it is made lenient or benevolent, by being subjected to their review in its exercise.

c. You may not build a house in a city, or deliver building material to your lot, or connect your house plumbing with the water main in the street, and so on through a list of things, without a permit or license; and yet no one will say upon second thought that such a license may be refused to you at will. If you comply with all reasonable requirements or regulations prescribed as conditions precedent you are entitled to it. These are simple instances, it is true, but the present case, once understood, is equally plain. We have before us an occupation which may not be arbitrarily prohibited, but may only be regulated by the Legislature or by its authority by reasonable conditions and requirements, and which may be subjected to a permit or license to that end and to that extent only, and not for the purpose of prohibition at all.

d. The matter is one in which it is difficult to get astray if a certain distinction be kept in mind and easy to get astray if it be not. There are occupations which are not and never have been free, such as the sale of intoxicating drink, the storage of explosives, the slaughter of cattle, public shows or plays; such as cause great noise or vile odors; those of common carrier, mail carrier, innkeeper,

auctioneer, public hackman, public wharfinger, public warehouseman within limits, and the like, who have public duties to perform, and exercise "a sort of public office," as the cases say (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. [U. S.] p. 382); because the safety, welfare and essential comfort of society forbid that they should be. Such occupations are inherently dangerous or annoying to the community; or else are affected with a public interest, or pertain to the public service or a public use, and are therefore of the nature of privileges instead of rights. Some of them may be prohibited altogether, some within certain territorial limits, and others beyond a limited number, under the police power of the state, which arises from and rests on the community right of self protection and self preservation. Reference to a list of cases in illustration may not be attributed to the overgrown habit of citation when it is possible for such a momentous question to arise in our free government as is presented by this case (*Munn v. Illinois*, 94 U. S. 113; *Mugler v. Kansas*, 123 id. 623; *Crowley v. Christensen*, 137 id. 86; *Wilson v. Eureka City*, 173 id. 32; *Gundling v. Chicago*, 177 id. 183; *Fischer v. St. Louis*, 194 id. 361; *California Reduction Co. v. Sanitary Reduction Works*, 199 id. 306; *Slaughter House Cases*, 16 Wall. 36; *City of Brooklyn v. Breslin*, 57 N. Y. 591; *Cronin v. People*, 82 id. 318; *People ex rel. Oak Hill Cemetery Assn. v. Pratt*, 129 id. 68; *People v. Ewer*, 141 id. 129; *Matter of O'Rourke*, 9 Misc. Rep. 564).

These prohibitible occupations should not be confused with the multitude of free and lawful occupations which cannot be prohibited, but may in some cases be regulated for like reasons of the general safety, welfare and comfort. No one would think of assigning the sale of milk or any of the other ancient and ordinary occupations of life, like those already enumerated, to the former class. They cannot be prohibited as inherently noxious to society, for they are not; nor restricted to a limited number for the general welfare, for the general welfare does not require it, but the contrary, in order that the economic laws of trade and prices may not be dislocated or thwarted; or for pertaining to the public service or a public use, or as affected with a public interest, for they are not of that class; but they may be subjected to regulation, and in cases of occupations requiring for the safety of the community scientific skill,



or special knowledge, or even moral excellence, such as that of master plumber, engineer, physician, and the like, to regulation in respect of such qualifications, according to the case; all of such regulations, however, to be applicable to all persons alike, so that no one be discriminated against nor arbitrarily excluded; for our system of government was constructed on an abhorrence of arbitrary power as its corner stone (*Barbier v. Connolly*, 113 U. S. 72; *Yick Wo v. Hopkins*, 118 id. 356; *Haroker v. New York*, 170 id. 189; *Plumley v. Massachusetts*, 155 id. 461; *Schollenberger v. Pennsylvania*, 171 id. 1; *Collins v. New Hampshire*, Id. 30; *Capital City Dairy Co. v. Ohio*, 183 id. 238; *Dobbins v. Los Angeles*, 195 id. 223; *People v. Marx*, 99 N. Y. 377; *People v. Gillson*, 109 id. 389; *City of Buffalo v. Collins Baking Co.*, 39 App. Div. 432; *People ex rel. Schwab v. Grant*, 126 N. Y. 473; *People ex rel. Nechamcus v. Warden, etc.*, 144 id. 529).

e. And such regulation is invariably effected by means of the requirement of licenses or permits to engage in such occupations, that being, however, only a means of affording notice to the public authorities of all persons who do so, in order to enable them to exact the reasonable qualifications or conditions imposed, and thereafter make the necessary inspections to enforce the regulating ordinances or laws by criminal prosecutions, or the collection of the penalties prescribed or allowed to be prescribed by statute, or in any other lawful way.

f. There are thus two distinct systems of licensing which must not be confused together, (1) the one of occupations which may be prohibited by the Legislature altogether, and therefore by dispensing power tolerated and allowed to many or to a few, as the Legislature may see fit, and of occupations that may be prohibited by it partly, viz., in a locality, or in excess of a limited number; and (2) the other of occupations that may not be prohibited at all, and which is wholly for the purpose of regulation. In the same way licenses of free and lawful occupations are resorted to for taxation, and no one may be refused a license who tenders the tax. To enter upon a consideration of this subject without this distinction in mind would be like putting to sea in a rudderless ship.

g. If our executive officers could arbitrarily restrict the number of persons to carry on the ordinary and necessary vocations of life,

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and select such persons, the exalted conception of our government as one of laws and not of men would be at an end. And even if our Legislatures could do the like, or empower executive officers to do it, how long would it be before such power would be made the means of the gross official extortion which we know from the world's experience to be inseparable from arbitrary power or paternalism in government? Such power in executive or administrative officers in this state in respect of licensing the liquor traffic was used for that purpose to such an extent that all discretion in granting such licenses had finally to be taken away. Those who meditate a recourse to arbitrary power for a good purpose should pause to consider the consequences, for it is a vice which brings in its train all of the vices, and especially the detestable vices of official extortion and blackmail. Good men in good times should beware of setting bad precedents for bad men in bad times. The sale of impure milk or other food is bad, but far worse, and fraught with far greater evils, would be the growing exercise by executive officials of powers not conferred on them by law. If they were suffered to require licenses for the ordinary occupations of life, and refuse them to whom they willed, how long would it be before such licenses would be sold for money, or for political favor or partisan fidelity? And what would be the effect on the price of milk—and on its purity also? The answer is in every mind; both would be debauched. Ample lawful powers may be exercised by the Legislature and the board of health to prevent the evil of impure milk. The exercise of arbitrary power would not only fail of that result, but would be attended by immeasurably worse evils.

3.— If the foregoing contention were not true, namely, that the Legislature has not the power to arbitrarily prohibit the ordinary useful and necessary occupations of life, or to confer power to do so, to say that the mere power given to a board of health by the Legislature to impose the requirement of a license for them implies and carries with it power to revoke such a license at will, would still be erroneous as against the rule that official powers may be conferred by statute only by express words or necessary implication. It was never true even of licenses to sell intoxicating drinks as we all know. The power of licensing boards or officers or of courts to

revoke such licenses depends wholly on whether and to what extent the Legislature has conferred it. We are all too familiar with that phase of our present excise statute, and of the system of excise statutes which existed in this state from the beginning up to the time of its adoption, to make it necessary to enter upon a discussion of the subject. That no power to revoke such a license existed or now exists except by being given by statute will be disputed by no one. The notion that power to executive or administrative officials to grant a license carries with it inherently power to revoke is a novel one.

4.—The argument that the board of health may not be deemed restricted to the enforcement of the punishment prescribed by statute, or by its own lawful ordinances, for the violation of its ordinances, because that would leave it possible for an offender to offend again even while being prosecuted for a prior offense, or after his conviction thereof, if his permit be not revoked, would be a strange one for a court to listen to, much less suggest, as showing that the board has the power to revoke. No one could indulge in it without forgetting himself. If the severe punishment of one year's imprisonment and \$500 fine be not enough to secure obedience to the sanitary ordinances of the city of New York—an incredible pretence—and the board of health be without power to prescribe a severer one, that is a consideration to be addressed to the Legislature, not to the courts—nor to the executive department of government.

5.—An examination of the argument or legal thesis which is opposed to the foregoing discloses, as it seems to me, the continual confusion and misapplication of what the Legislature has power to do with what executive or administrative officials may do. The case of the latter always is, not what the Legislature may do, or empower them to do, but what it has done, or empowered them to do, and then whether they have acted within the power given. It is worse than useless, for instance, because it is misleading, to cite cases like *Doyle v. Continental Ins. Co.* (94 U. S. 535) for the proposition that a license or permission is always revocable by the officials who grant it; because the question there decided was only that the state, the Legislature, may by statute make licenses revocable, and not that mere power to administrative or executive

officials to license carries with it inherently power to them to refuse at will and revoke at will. If the Secretary of State had assumed to revoke in that case without any legislative authority, then the case would be applicable here. Moreover, the case had to do with a business which the state had the power to prohibit entirely within its borders, viz., that of a foreign insurance company. The case of *Hawker v. New York* (170 U. S. 189) also dealt with an act of the Legislature, not with an ordinance, and much less with an official act based on neither statute nor ordinance, as is the case here. Nor is any authority needed for the proposition that a valid local ordinance or by-law has the same authority within the territory to which it is limited as an act of Parliament or of the Legislature. That is not the point here; we are bending our minds to the question whether this relator was dealt with by any act, ordinance or by-law, or by a mere assumption of power.

6.—It does not seem necessary to point out that the case of *People ex rel. Lieberman v. Van De Carr* (199 U. S. 552) has no application to the present case. There the validity of this same ordinance was the only question up, the test being made by means of the writ of *habeas corpus* by one under arrest for selling milk without a permit, and who sought his discharge on the sole ground that the ordinance was void. It was for him to have compelled the giving of a permit to him, or the reinstatement of his old permit, by writ of mandamus; for the requirement of a permit is valid as within the power of regulation, and a permit is therefore necessary, the same as a requirement of a permit to build a house, or to extend a water pipe from the street main to your house, for instances out of many, is valid and a permit therefor necessary, even though it cannot be lawfully refused, being permitted not for prohibition but only for regulation. There is no question made here of the validity of this ordinance. The learned judge who wrote the opinion in the *Lieberman* case several times speaks of the power "to grant or withhold" licenses or permits, using the phrase as though power to grant is only a corollary of power to refuse, which is quite true in the case of occupations which may be prohibited, but not at all true in the case of occupations which may not be prohibited, as has already been pointed out—a distinction which the learned judge himself would have been the first to make if there had been before him a case call-

ing for it. But there was not; the sole question before him was whether the ordinance requiring a license was valid. We have been too recently admonished that the actual point decided in a case is all that we should follow, to be misled by inadvertent or irrelevant expressions in judicial opinions (*Colonial City Traction Co. v. Kingston City R. R. Co.*, 154 N. Y. 493; *Crane v. Bennett*, 177 id. 106).

7.—Since the foregoing was written the decision in the case of *Metropolitan Milk & Cream Co. v. City of New York* (113 App. Div. 377; 186 N. Y. 533) has been published. That case was an action for damages against the city and its department of health. The complaint was that they damaged the plaintiff by preventing it from selling its milk in the city of New York. A defense was pleaded in substance that the creamery or dairy of the plaintiff from which it brought its milk to the city was in a filthy, unwholesome and unhealthy condition, and that its milk was in the same condition, and that for that reason the department of health, after giving a hearing to the plaintiff on the said facts on notice, revoked the plaintiff's permit and prevented it from bringing such milk into the city and selling it. Such defense was held on demurrer not to be insufficient on its face, and this was affirmed by the Court of Appeals without opinion. Now, without regard to the power of the board to refuse a permit at will, or to revoke one at will, it is obvious that the pleaded defense was good, for no one can be liable in damages for preventing another from doing anything that is a crime, which the sale of unwholesome milk is. We cannot therefore assume that the Court of Appeals put its decision on any other ground, in the absence of any stated ground by it. Nor are the observations in the opinion of the Appellate Division based on the revocation of the permit relevant or binding here, for they had reference to revocation in that case on a hearing on notice by the board of health on the assumption that such a hearing could be had by it; whereas in the present case there was no such hearing, and none could be had because none was prescribed. It seems to have been taken for granted by the learned judge there writing that there is some statute or ordinance prescribing such a hearing and granting such power of revocation and disqualification, whereas we now know there is not.

The order should be affirmed.

HIRSCHBERG, P. J., and HOOKER, J., concurred on the ground that the permit could not be revoked in any event without notice to the relator and a hearing; JENKS, J., concurred in separate opinion, with whom WOODWARD, J., concurred.

JENKS, J. (concurring):

I am for affirmance because there was no ordinance or regulation of the board which authorized the revocation for the cause returned. Administrative policy in this case is not equivalent to an ordinance. I might stop here, but for the fact that a general discussion has been made. Bacon, Lord VERULAM, says: "For many times the things deduced to judgment may be *meum* and *tuum* when the reason and consequence thereof may trench to point of estate." As I differ from the opinion of my brother GAYNOR in many things, and from others in this court from their conclusion, I shall give my reasons for dissent. An eminent English judge, PARKE, J., in *Mirehouse v. Rennell* (1 Cl. & F. 527, 546) said: "Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." (Cited in Dicey, Law and Opinion in England, p. 364.)

I think that this board of health has power to enact an ordinance, or resolution of general application, to the effect that its permit to sell milk shall be revoked by it, if the holder or his servants be convicted in the courts of selling adulterated milk, and that such ordinance need not provide that notice must be given to the holder after such conviction before such revocation can be made. I think this ordinance would not offend against Constitution or laws. The obligation of a contract would not be impaired. Property would

not be taken without due process of law. Unauthorized punishment would not be inflicted. No act of arbitrary despotism would be done. And I shall attempt to show that this ordinance would be in a lawful exercise of the police power.

What is the purpose and the effect of such ordinance? Milk is almost an universal food, and for the very young the principal if not the exclusive food. It is capable of adulteration beyond the detection of the ordinary consumer. If adulterated it may not only be impaired but be positively dangerous to health and to life. The dweller in a great city cannot investigate the origin, the collection or the processes which result in the sale of his daily food to him as a unit of many millions. He who buys milk for daily consumption cannot seek out the herd, or view the dairy, or investigate the channels or become acquainted personally with the agents whereby the milk finally reaches his table. And, hence, government steps in to regulate the sale of this commodity by the requirement of a standard. The law now protects the consumer by punishing the seller of bad milk. It is decided that the regulation of such business by requirement that it must be carried on pursuant to a permit of the board of health of the city of New York is a lawful and reasonable exercise of the police power in the protection of the public health. (*People ex rel. Lieberman v. Van De Carr*, 175 N. Y. 440; 199 U. S. 552.) To deny the privilege of sale to those who have shown themselves improper persons to traffic in such food is a practical method of preserving the public health. In the last analysis the life and health of the consumer are preserved rather than the livelihood of the seller. By such an ordinance an individual would be deprived of his permit to sell milk perforce of a provision (of course applicable alike to all other holders of permits) because he is an unfit person in that he has been convicted of selling adulterated milk. Government is for all the people, not for an individual, so as to assure to him continuance in a pursuit which may be dangerous and even death-dealing.

1. In *Polinsky v. People* (73 N. Y. 65), ANDREWS, J., for the court, says: "That the Legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open ques-

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tion. This power has been repeatedly recognized and affirmed (citing authorities). And ordinances designed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations."

2. Such power has been conferred upon this board in the Greater New York charter by the Legislature of this State. (*People ex rel. Lieberman v. Van De Carr*, 175 N. Y. 440.)

3. (a) Generally, the power to license implies the power of revocation. In *Doyle v. Continental Ins. Co.* (94 U. S. 535, 540) the court say: "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Rector v. Philadelphia*, 24 How. [U. S.] 300; *People v. Roper*, 35 N. Y. 629; *People v. Commissioners*, 47 N. Y. 50.* The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 16 Wall. 244; *Tomlinson v. Jessup*, 15 id. 454." There is not, to my mind, any force in the discrimination that would find such power of revocation in the State and not in a branch of the State government on which the power to issue a permit has been conferred by the State. In *People ex rel. Schwab v. Grant* (126 N. Y. 473) the court say (p. 481) "A power to grant a privilege to one is inconsistent with the possession on the part of another of an absolute right to exercise such privilege. The requirement that a person must secure leave from some one to entitle him to exercise a right, carries with it by natural implication, a discretion on the part of the other to refuse to grant it, if, in his judgment, it is improper or unwise to give the required consent." In *State v. State Board of Medical Examiners* (34 Minn. 387, 26 N. W. Rep. 124), the court, per MITCHELL, J., say: "It has never been held that the granting, or refusing to grant, such a license as this was the exercise of judicial power, and in fact this is not claimed in this case; and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is, in each case, identical, viz., to exclude an incompetent or unworthy person from this employment. Therefore, the same body which

* *People ex rel. Davies v. Commrs. of Taxes of N. Y.*, 47 N. Y. 501.—[REP.]

may be vested with the power to grant, or refuse to grant, a license may also be vested with the power to revoke. The statutes of all the States are full of enactments giving the power to revoke license of dealers, inn-keepers, hackmen, draymen, pawubrokers, auctioneers, pilots, engineers, and the like, to the same bodies, boards or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the police power has often been sustained, and, indeed, rarely questioned. Cooley Const. Lim. 283 and 597 and cases cited." (See, too, *People ex rel. Van Norder v. Sewer Com.*, 90 App. Div. 555, 558, 559, and authorities cited.)

(b) *Metropolitan Milk & Cream Co. v. City of New York* (113 App. Div. 377) decides that such permits are revocable by the department of health, and that the department was not restricted to a criminal prosecution of a licensee selling unwholesome milk. In that case the city and the department answered separately. In paragraph 8 of each answer the defendant pleaded that by virtue of the laws of the State of New York and the Sanitary Code of the city of New York the department of health of the city had authority and power to prevent the plaintiff from keeping and selling therein impure milk, and also that after investigation it had found that the plaintiff was shipping and sending such milk to the city to be sold, whereupon the department, after notice to the plaintiff and a hearing, revoked the license or licenses, "as it had a right to do and as it was its public duty to do and not otherwise." The following questions were certified to the Court of Appeals: "Is the separate defense contained in the answer of the defendant The City of New York" (or *mutatis mutandis* the department of health of the city of New York) "insufficient in law upon the face thereof?" That court affirmed the order, and answered the questions certified in the negative (186 N. Y. 533). I regard it as settled, then, by the highest court of this State, that the department of health has the power to revoke permits issued for the sale of milk in that city. The principle is stated in Cooley's Constitutional Limitations (7th ed. p. 887): "Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or taken away from a party detected in dishonest practices." The liberty to

pursue any particular vocation or calling is subject to regulation by the police power for the benefit of the public morals, welfare or health. (*Dent v. West Virginia*, 129 U. S. 114; *Soon Hing v. Crowley*, 113 id. 703; *Gundling v. Chicago*, 177 id. 183; *Crowley v. Christensen*, 137 id. 86.) In the last case cited the court say: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." In *Dent v. West Virginia* (*supra*) the court, per FIELD, J., says: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."

4. If this board has the power of revocation for sale of bad milk, it can express that power by ordinance. The permits in the *Metropolitan Milk & Cream Co. Case* (*supra*) were revoked on the ground that the plaintiff had furnished and had sold impure milk. Unless there could be revocation by the board only after actual investigation by the board itself and its determination thereupon that the relator had twice sold impure milk, I can see no objection to an ordinance based upon such offending. Indeed, section 1172 of the charter (Laws of 1901, chap. 466, as amd. by Laws of 1904, chap.

628) provides that the board may provide for the enforcement of the Sanitary Code "by such fines, penalties, *forfeitures* or imprisonment as may by ordinance be prescribed." (See, too, the full section, also § 1169, and *Polinsky v. People, supra*; *Metropolitan Milk & Cream Co. v. City of New York, supra*; 4 Am. & Eng. Ency. of Law [2d ed.], 599.) The term "forfeiture" may refer to the absolute or indefinite revocation of a license. (Words & Phrases Judicially Defined, 2897.)

5. The ordinance is based upon the proposition that he who has sold impure milk is an unfit person to hold a permit to sell milk. In resting the ordinance upon a conviction for the very act which the board seeks to prevent, the board but applies the doctrine of *res judicata*. For the conviction was, as between the State and the individual, an adjudication of the fact that the relator had done the thing prohibited. (*Hawker v. New York*, 170 U. S. 189.) The board would have a right to ordain that such convictions should be sufficient evidence of the unfitness of the relator to hold such a license. (*Hawker v. New York, supra*; *Sprayberry v. City of Atlanta*, 87 Ga. 120.) The ordinance is founded upon an adjudication that the relator had sold impure milk, as much as if the board or department had investigated the alleged offense and had found it. Surely a conviction of the offense in the criminal court may be as cogent proof that the relator had violated the law as a determination by the board upon its own investigation. In *Hawker v. New York (supra)* the statute in effect made the conviction evidence of the absence of the requisite good character. The court held that if the State might require good character as a condition, "it may rightfully determine what shall be the evidences of that character." It said, per BREWER, J.: "We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. *County Seat of Linn County*, 15 Kansas, 500, 528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the Legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired

result. These are questions for the Legislature to determine. 'The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.' *Dent v. West Virginia, supra*, p. 122."

The fact that there would be an ordinance, not a statute, does not affect the application of the principle. An ordinance pursuant to the authority of the Legislature has like force within the limits of its operation as a statute. (*Polinsky v. People, supra*; *Village of Carthage v. Frederick*, 122 N. Y. 268; *Dillon Mun. Corp.* [4th ed.] § 308 and note; *Heland v. City of Lowell*, 3 Allen, 407.) In *Sprayberry v. City of Atlanta (supra)* the court held that the common council, in its power to regulate the retail of ardent spirits, and its then discretion to issue license to retail or to withhold the same, might pass an ordinance to the effect that the mayor and common council could forfeit a license, and that a conviction of a violation of a State statute in relation to the sale of ardent spirits shall work an immediate revocation of the license.

6. Notice is not essential. The doctrine of *Stuart v. Palmer* (74 N. Y. 183) does not apply. The permit is not property in the sense that such a revocation thereof is the taking of property without due process in that there is no notice thereof. "The popular understanding of the word license undoubtedly is, a permission to do something which without the license would not be allowed. * * * This is also the legal meaning." (COLEY, J., in *Youngblood v. Sexton*, 32 Mich. 406, 410.) "A license is not property. It is a mere temporary permit to do what otherwise would be illegal, issued in the exercise of the police power." (Words & Phrases Judicially Defined, 4137, citing *Lantz v. Hightstown*, 46 N. J. Law, 107; *Voight v. Board of Excise*, 59 id. 358.) The license or permit is not a contract. (*Commonwealth v. Kinsley*, 133 Mass. 578.) In *Metropolitan Board of Excise v. Barrie* (34 N. Y. 657) the court, speaking of an excise license, say: "These licenses to sell liquors are not contracts between the State and the persons licensed, giving the latter vested rights, protected on general principles and by the Constitution of the United States against subsequent legislation, nor are they property in any legal or constitutional sense. They have neither the qualities of a contract or of property, but are merely temporary permits to do what otherwise would be an offense against a general law. They form a

portion of the internal police system of the State ; are issued in the exercise of its police powers, and are subject to the direction of the State government, which may modify, revoke or continue them, as it may deem fit." Neither the ordinary permit or license, nor the former excise license, is so similar to the present liquor tax certificates as to make the decisions that hold that the latter are " a species of property " apply. The quality of property is attributed to the liquor tax certificates perforce of provisions singular to the present excise law. (*Matter of Lyman*, 160 N. Y. 96; *Niles v. Mathusa*, 162 id. 546, 549; *People v. Durante*, 19 App. Div. 292.) The purpose of notice is to afford a hearing, but the ordinance of revocation would be based upon conviction in a criminal court for sales of unwholesome milk, whereat, of course, the relator was entitled to a hearing. The fact of the improper sales was, therefore, adjudicated after a hearing. What purpose is served by a hearing before the board or department when the ordinance is based upon such adjudications? The board or department cannot review the conviction. The learned Special Term suggests that inasmuch as the Agricultural Law* made possible a conviction although the seller has no knowledge of the impurity of the milk, that if the board afforded a hearing, there might be a plea in extenuation of the conviction. But this view is from the point that the revocation is a punishment, whereas it is but for the protection of the public health. It is the fact of the sales of impure milk that moves the board to revoke the permit, and not whether the sale was intentional, wanton or negligent. It certainly would impair the vigor of the ordinance if the board were to make it depend upon the question whether the *scienter* of the seller were proved in the criminal trial, for in that event the careless or negligent seller would be licensed to continue in his traffic. If a conviction *per se* furnished the reason for the ordinance, and the conviction could not be disturbed by the board, and if the ordinance is based upon the conviction and not upon the intent of him who was convicted, it seems to me that notice and a hearing before the ordinance was invoked would be a vain thing. Suppose that notice were given, what could be urged by the relator

* See Laws of 1893, chap. 338, §§ 20, 22, as amd. by Laws of 1900, chap. 101; Laws of 1904, chaps. 480, 566, and Laws of 1905, chap. 602; Id. § 37, as amd. by Laws of 1901, chap. 656.—[REP.]

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as his legal right? To say the least, it was entirely proper in the *Metropolitan Milk & Cream Co. Case* (*supra*) that the licensee should receive notice and should be heard, for the department itself made the investigation and the determination that the licensee had sold impure milk. But in the case of the ordinance, the licensee would have been afforded a hearing on that question in the procedure of the courts which resulted in convictions of the offense. To afford him another hearing is but to seek to review the judgment of the court. In *Martin v. State* (23 Neb. 371; 36 N. W. Rep. 554) the statute provided that the mayor and common council might by ordinance license, restrain, regulate or prohibit the selling of liquor and that the licenses might be revoked upon the conviction of the licensee of a violation of the law pertaining to the sale of intoxicating liquor; and the contention was that notice must be given to the licensee before revocation. But the Supreme Court of Nebraska, per REESE, C. J., after an examination of many authorities, said: "In this case, the statute makes no reference to the hearing of a complaint by the mayor and council, but simply provides that 'the license shall be revoked by the mayor and council, upon conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of such liquors,' etc. No trial or investigation could be had. The certificate of the police judge showing a conviction of plaintiff in error was before the council. They had but a simple ministerial duty to perform, in obedience to the plain mandate of the law, and that was to revoke the license. It is stipulated that he was convicted of the offense stated in the certificate of the police judge. It is admitted that the certificate was true. That being the case, no defense could have been made, and no notice was necessary to give the council jurisdiction." In *Health Department v. Rector, etc.*, (145 N. Y. 40, 41), the court, per PECKHAM, J., say: "The Legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. So far as this objection of want of notice is concerned, the case is not materially altered in principle from what it would have been if the Legislature had enacted a general law that all owners of

tenement houses should, within a certain period named in the act, furnish the water as directed. Indeed, this act does contain such a provision, but the plaintiff has not proceeded under it. If in such case the enforcement of the direct command of the Legislature were not to be preceded by any hearing on the part of any owner of a tenement house, no provision of the State or Federal Constitution would be violated. The fact that the Legislature has chosen to delegate a certain portion of its power to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out." (See, too, *Chicago, etc., Railroad v. Nebraska*, 170 U. S. 57, 76; McGehee's *Due Process of Law*, 374, note.)

Moreover, if the ordinance provided that revocation would follow upon such conviction, the holder of the permit would be bound to take notice that such was the law. (*Heland v. City of Lowell*, 3 Allen, 407; Dillon, *supra*, § 416, note; McQuillin's *Municipal Ordinances*, § 22, and authorities cited; *Baldwin v. Smith*, 82 Ill. 162.) In the last case the court say: "There is no condition in the license and no reference to any ordinance of the town authorizing its revocation for cause, yet it must be held to have been granted subject to such ordinances of the town as had a legal existence at the time the same was granted, and such as were within the competency of the town authorities to enact."

7. The revocation by ordinance would not be an exercise of judicial power, but would be incidental to the administrative power. (*Matter of Armstrong v. Murphy*, No. 2, 65 App. Div. 126; *State ex rel. Drake v. Doyle*, 40 Wis. 175; *State v. State Board of Medical Examiners*, 34 Minn. 387; *State ex rel. Granville v. Gregory*, 83 Mo. 123; McGehee, *supra*.) In the case of *Public Clearing House v. Coyne* (194 U. S. 497) the court say (pp. 508, 509): "That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. *Murray's Lessee v.*

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Hoboken Co., 18 How. [U. S.] 272, 280; *Bushnell v. Leland*, 164 U. S. 684." (And see, too, *Buttfield v. Stranahan*, 192 U. S. 470.)

It is true that the effect of the rule is to bar the seller from continuance in that traffic. But that is but a consequence of the working of the rule, not the object of it. The ordinance would not be for the punishment of the seller for his past offense, but for the protection of the buyers. In *Hawker v. New York* (*supra*) the statute deprived the plaintiff of the right to practice medicine perforce of conviction of a crime, and the point was made that it was a further punishment. It was met by the court, per BREWER, J., who said: "That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter." (See, too, *The Queen v. Vine*, L. R. 10 Q. B. 195.) That convictions are not a full deterrent is shown in this case, inasmuch as there were four convictions at different times, extending over a period of a little over three years.

To my mind there would be nothing sinister in this ordinance, or nothing contrary to the spirit or the letter of law. In these days of adulteration of food, when, as the poet sings,

"Chalk and alum and plaster are sold to the poor for bread,
And the spirit of murder works in the very means of life,"

it would be a wholesome measure in furtherance of the principle of the greatest good of the greatest number.

WOODWARD, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

SOLOMON L. REISS, as Surviving Partner of the Firm of REISS & BERNHARD, and Doing Business under Said Firm Name, Appellant,
v. WILLIAM PFEIFFER, as Executor, etc., of MINNIE PFEIFFER,
Deceased, and the UNITED STATES FIDELITY AND GUARANTY
COMPANY, Respondents.

Second Department, March 15, 1907.

Evidence — when representative capacity of defendant admitted by pleading — practice — when adjournment should be granted to allow production of documentary evidence.

The plaintiff had brought a prior action in which personal property in the possession of defendant Pfeiffer was attached. The defendant's mother claimed to be the owner and secured possession of the property by filing a bond under section 85 of the Municipal Court Act of the city of New York. Thereafter she died and the defendant Pfeiffer was appointed her executor. In an action against him as executor and the surety company on the bond, the plaintiff alleged the death of the mother and the granting of letters testamentary to the defendant Pfeiffer, which allegation was not denied by him.

Held, that it was error to dismiss the complaint as against the executor on the theory that his representative capacity was not proved, for as to him the fact was admitted by the record;

That as to the defendant surety company it was an abuse of discretion to refuse a short adjournment to enable the plaintiff to make proper proof of the probate of the will and the issuance of letters testamentary as an objection to oral evidence thereof took the plaintiff by surprise.

APPEAL by the plaintiff, Solomon L. Reiss, as surviving partner, etc., from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendants, rendered on the 9th day of April, 1906.

Isidor Buzbaum, for the appellant.

James E. Fineman, for the respondents.

RICH, J. :

The plaintiff appeals from a judgment dismissing his complaint upon the merits. In November, 1905, the plaintiff commenced an action in the Municipal Court against William Pfeiffer for the recovery of a money judgment in which a warrant of attachment issued, and a city marshal attached certain property in the possession of the defendant in that action. Before its removal one Minnie

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Pfeiffer, the mother of the defendant, claimed to be its owner, and under the provisions of section 85 of the Municipal Court Act (Laws of 1902, chap. 580) executed and filed her bond to the plaintiff with the defendant the United States Fidelity and Guaranty Company, surety, conditioned "that in an action upon the bond, to be commenced within three months thereafter, the claimant will establish that she was the general owner of the property claimed at the time of the seizure, or if she fails so to do that she will pay to the plaintiff the value thereof with interest," whereupon the marshal surrendered possession of the attached chattels to her.

Minnie Pfeiffer died, and on February 6, 1906, plaintiff commenced this action to recover upon the bond. After proving the various process and proceedings in the action in which the attachment issued and the execution of the bond by the defendants the plaintiff rested and the defendant company moved to dismiss the complaint upon the ground that there was no evidence in the case of the death of Minnie Pfeiffer or the appointment of William Pfeiffer as her executor. The plaintiff was then permitted to reopen his case and call the defendant Pfeiffer by whom he proved the death of said Minnie, his mother, but was not permitted to prove by the witness that she left a will which was probated, or that letters testamentary were issued thereon, objection being made that the will, decree of probate and letters were the best evidence of those facts. Plaintiff's counsel thereupon asked for an adjournment to enable him to procure competent evidence of these facts. This was denied and the complaint as against the surety company dismissed.

The defendant Pfeiffer thereupon introduced evidence and the case was tried as to him upon the merits. The court subsequently rendered judgment in favor of the defendants dismissing the complaint upon the merits, and in his memorandum opinion says: "I am convinced that the deceased Minnie Pfeiffer was not the owner of the property referred to in the complaint, but that William Pfeiffer was the owner thereof. However, I feel compelled to dismiss the complaint, because of the failure on the part of the plaintiff to make a case at law." The learned court must have overlooked the fact that the plaintiff alleged in his complaint "That said Minnie Pfeiffer departed this life at the Borough of Brooklyn, New York

City, on the 7th day of January, 1906, leaving a last will and testament in which the defendant William Pfeiffer was named as the executor thereof, and that said last will and testament was duly admitted to probate in the Kings County Surrogate's Court, and that letters testamentary on the estate of said Minnie Pfeiffer, deceased, were duly granted and issued to said William Pfeiffer, who is made a defendant herein as such executor and whose letters have not been revoked." This allegation was not denied or put in issue by the answer of the defendant Pfeiffer. As to him those facts were admitted upon the record. The trial court having reached the conclusion that William Pfeiffer was the owner of the chattels, plaintiff was entitled to judgment against the defendant Pfeiffer as executor, and as to him the judgment must be reversed. It is apparent from the record that the plaintiff was surprised by the objection of the defendant surety company to the introduction of oral evidence of the existence of the will, its admission to probate and the issuance of letters testamentary. His application for a short adjournment to permit his production of the records was not an unreasonable request, and ought, we think, in the exercise of a wise discretion, to have been granted upon such terms as to the trial court seemed proper.

The judgment must be reversed as to both defendants and a new trial ordered, costs to abide the event.

JENKS, HOOKER, GAYNOR and MILLER, J.J., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

MARTHA F. HOCH, Respondent, v. BROOKLYN BOROUGH GAS
COMPANY, Appellant.

Second Department, March 23, 1907.

Gas — refusal to supply gas for failure of applicant to pay sums due from a former occupant — when penalty recoverable.

The penalty and forfeiture imposed by section 65 of chapter 566 of the Laws of 1890 on a gas company for failure to supply an applicant with gas notwithstanding arrears are due from a former occupant of the building contemplates a continuation of the supply of gas after it has been begun.

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APPEAL by the defendant, the Brooklyn Borough Gas Company, from a judgment of the Municipal Court of the city of New York in favor of the plaintiff, and also from an order denying the defendant's motion for a new trial made upon the minutes.

The plaintiff made a written application to the defendant to have her hotel supplied with gas, and it complied therewith in May, 1904. The bills therefor were rendered and paid weekly up to the following September. The defendant then demanded that the plaintiff pay \$8.25 due for the current week and also \$22.76 which was due to it by a former occupant of the plaintiff's premises for gas furnished to him, and because she refused to pay it the defendant disconnected her premises from its main and refused to supply her with gas, until the following December 20th, when it received the said \$8.25 and resumed the supplying of gas to her. She offered to pay the \$8.25 for the week she owed it for, both before and after the gas was cut off, but the defendant refused to receive it on or in payment of that bill, until December 20th. It demanded that both that sum and the \$22.76 be paid to save the gas from being cut off, and cut it off because she would not pay both sums.

George C. Eldridge [*Arthur H. Cameron* with him on the brief],
for the appellant.

Henry Herrold, for the respondent.

GAYNOR, J. :

This action was brought to recover the statutory penalties for the refusal of a gas company to supply gas to the occupant of a building. The statute is that if an owner or occupant of a building situated within 100 feet of a main of a gas company make application in writing to the company to be supplied with gas, and pay the deposit required by the statute, the company shall supply such gas, notwithstanding there may be arrears due for gas supplied by it to a former occupant of the building; and that if it refuse or neglect to do so for ten days it shall forfeit and pay to the applicant ten dollars and also five dollars a day thereafter while such neglect or refusal continues (Laws of 1890, chap. 566, § 65).

The contention of the defendant is that the statute only covers the case of a neglect or refusal to begin to supply gas after such

written request; that it does not cover a case where the supply has been cut off after having been begun. On the contrary, the statute contemplates a continuance of the supply after it has been begun, and the payment of the daily penalty for any interruption thereof by the defendant amounting to a neglect or refusal to supply gas (*Meiers v. Metropolitan Gas Light Co.*, 11 Daly, 119).

The judgment and order should be affirmed.

HIRSCHBERG, P. J., HOOKER, RICH and MILLER, JJ., concurred.

Judgment of the Municipal Court affirmed, with costs.

ANNIE C. HOFF, Appellant, v. ROYAL METAL FURNITURE COMPANY,
Respondent.

Second Department, March 22, 1907.

Landlord and tenant — covenant for perpetual renewal.

A definite covenant for the perpetual yearly renewal of a lease is not void.

Thus where the tenant, its successors and assigns have the privilege of renewing the lease from year to year upon notice in writing, the covenant is not indefinite, and when the landlord refuses to renew the lease and seeks to dispossess the tenant his petition in summary proceedings should be dismissed.

HOOKER, J., dissented, with opinion.

APPEAL by the plaintiff, Annie C. Hoff, from a final order of the Municipal Court of the city of New York, borough of Brooklyn, rendered on the 7th day of May, 1906, dismissing the petition upon the merits, in a summary proceeding brought by a landlord to remove a tenant.

The lease was in writing and was made on May 1, 1903. It was for a term of one year from said May 1 at a yearly rent of \$600 payable in equal monthly payments on the 10th day of each month. It also contained the following covenant:

"Said party of the second part, its successors or assigns, to have the privilege of renewing this lease from year to year, upon notice to that effect in writing, given on or before the day of the date of the expiration of each and every year, by written notice addressed to the party of the first part at her last known address. The party

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of the second part to have the privilege of purchasing the above property at any time during the continuance of this lease or the renewals thereof, as hereinbefore specified, paying therefor the sum of \$6,000, free from all incumbrances."

Thereafter the tenant (party of the second part) gave such renewal notice each year, and continued as tenant by renewal, until the landlord refused to recognize such renewal notice given in January, 1906, to renew the lease from May 1, 1906, for one year, and on said May 1 instituted this proceeding against the tenant as holding over after the expiration of the term, having given a five days' notice to quit and surrender at the end of the year's lease.

Charles A. Decker, for the appellant.

Thaddeus D. Kenneson, for the respondent.

GAYNOR, J.:

The covenant for renewals is in no way indefinite; its specific performance could be decreed. A bare covenant to renew means on the terms of the original lease (*Tracy v. Albany Exchange Co.*, 7 N. Y. 472; *Western New York & Pennsylvania R. Co. v. Rea*, 83 App. Div. 576). That the covenant is for perpetual yearly renewals does not make it void. Such covenants are lawful and in general use (*Rutgers v. Hunter*, 6 Johns. Ch. 215, 219; *Hare v. Burges*, 4 K. & J. 45; *Blackmore v. Boardman*, 28 Mo. 420).

The case of *Western Transportation Co. v. Lansing* (49 N. Y. 499) is not in point. There the covenant was held to be non-enforceable for uncertainty in respect of the term, and also because the landlord had died. I suppose it is proper to say that the opinion is discursive and has to be read with discrimination. The exact point decided is all that serves as a precedent (*Colonial City Traction Co. v. Kingston City R. R. Co.*, 154 N. Y. 493).

The final order should be affirmed.

JENKS and MILLER, JJ., concurred; HOOKER, J., read for reversal.

HOOKER, J. (dissenting):

This is an appeal from a final order of the Municipal Court in a summary proceeding dismissing the petition on the merits. The lease was executed by the landlord on the 1st day of May, 1903,

and demised the premises to the tenant for a term of one year from that date, rent being payable monthly; it was further provided therein that "Said party of the second part (the tenant) its successors or assigns, to have the privilege of renewing this lease from year to year, upon notice to that effect in writing, given on or before the day of the date of the expiration of each and every year, by written notice addressed to the party of the first part (the landlord) at her last known address." The tenant occupied continuously until May 1, 1906. On January 22, 1906, it served a notice in writing on the owner giving notice that it would again avail itself of the privilege of renewal contained in the lease of the property for the ensuing year, commencing May 1, 1906, and that it intended to renew said lease from said May 1, 1906. The owner refused to assent to a renewal; the tenant elected to stand on its rights under the lease and the notice; it remained in possession after the 1st of May, 1906, and this proceeding was brought. By stipulation, the only question presented for the determination of the Municipal Court was whether, under the lease and the notice, the tenant had the right to remain in possession for the year commencing May 1, 1906; and that is the sole question presented for our consideration.

I think that after the expiration of the first year the tenancy was at most one from year to year. The doctrine of *Western Transportation Co. v. Lansing* (49 N. Y. 499) is applicable here. In that case the owner and the tenant had entered into a lease for the term of fifteen years, and it was therein provided that the tenant should have the privilege of keeping and occupying the premises for such further time after the expiration of said term as the tenant might choose to elect, yielding and paying therefor the same rent and all taxes as during the fifteen-year term. At the expiration of the term the lessee's representatives sought to renew the lease for a further term of fifteen years; the owner refused, and the Court of Appeals held that because of the privilege given to the lessee to renew for such term as he saw fit, the term of the lease was indefinite after the expiration of the fifteen years, and thereafter it created at most a tenancy from year to year. So, too, it was held in *Jackson v. Bryan* (1 Johns. 322) that a lease for so long as the lessee please creates a tenancy at the most from year to year, so long as both parties please.

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In the present case the lease was to extend, after the first year, for an indefinite time, as the tenant might find itself pleased to elect at some time in the future. It could either quit at the end of the first year, or stay indefinitely by serving its notices before each first of May. The duration of the term was to be solely in the discretion of the tenant, and was to be so long as it might please. Under the cases, therefore, the tenancy was not more than one from year to year after May 1, 1904, and the tenant gained nothing by the notice it served on January 22, 1906.

The order appealed from should be reversed and a final order of removal directed to be entered, with costs, and with costs of this appeal.

Final order of the Municipal Court affirmed, with costs.

FANNIE P. STRATTON, Appellant, v. THE CITY OF NEW YORK,
Respondent.

Second Department, March 22, 1907.

Municipal corporation — negligence — injury to pedestrians on incline leading to crosswalk.

It is for the jury to say whether a municipality is liable for injuries received by a fall on an obstruction in a city street built to enable an adjoining owner to draw wagons from the street, which consists of an arched, sloping way, six or seven feet long, eighteen inches wide and six inches high, dropping from the curb to the crosswalk, which has been maintained for five years, and upon which other pedestrians have fallen.

A pedestrian who slips upon such obstruction in the daylight is not guilty of contributory negligence as a matter of law.

(Per MILLER, J.): As the incline was intended for a driveway where none existed and where the sidewalk dropped to the crosswalk, it was for the jury to say whether a person of ordinary prudence would have anticipated the accident which happened to the plaintiff.

GAYNOR and JENKS, JJ., dissented, with opinion.

APPEAL by the plaintiff, Fannie P. Stratton, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 30th day of April, 1906, upon the dismissal of the complaint by direction of the court after

a trial at the Kings County Trial Term, and also from an order bearing date the 26th day of April, 1906, and entered in said clerk's office, denying the plaintiff's motion for a new trial made upon the minutes.

Charles P. Cowles [*Justus A. B. Cowles* with him on the brief], for the appellant.

James D. Bell [*William B. Ellison* with him on the brief], for the respondent.

RICH, J. :

We think plaintiff's complaint was improperly dismissed. She was seriously injured by a fall upon an obstruction at a crossing on the corner of Flatbush avenue and Dean street, in the borough of Brooklyn. It appears that the gutter had been filled with concrete several years before the accident, as a convenience to enable an occupant of one of the stores fronting upon this crossing to draw his wagon out of the street. The curb, at this point, was six inches high above the gutter; the construction extended from the top of the curb, arching a little and sloping eighteen inches from the curb to the pavement of the street; it was six or seven feet long and had remained in that condition until the day of the accident, except that its surface was worn smooth; the accident happened on a bright, clear day, and plaintiff might have seen it had she looked; it may be that she failed to exercise care and that she ought to have avoided this place; her evidence tends to show that as she placed her foot upon the smooth surface of this construction it slipped, causing her fall and injury. She was looking ahead into the street at the time, but we cannot say upon the evidence before us as matter of law that she was negligent in not observing the condition. She had a right to assume that the crossing was in a reasonably safe condition, and the question as to her negligence was in the first instance for the jury, providing there was evidence from which a finding of negligence on the part of defendant could be based.

Judge GRAY, in *Turner v. City of Newburgh* (109 N. Y. 301 305), says: "Municipal governments owe to the public the specific, clear and legal duty of putting and maintaining the public highways

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which are in their care, or under their management, in a good, safe and secure condition, and any default in making them safe and secure, or in so maintaining them, if occurring through the negligence of the officials, upon whom a duty is devolved by law, will render the city liable. Where the unsafe condition occurs through some other agency or instrumentality, negligence is not imputable until a sufficient time has elapsed to charge the city officials with notice." This obstruction had been there for over six years; there is no evidence that it was placed there by the city; it does appear, however, that other persons had fallen there, and sufficient time had elapsed to charge the officials of the city with notice of the condition. As to whether it was a dangerous obstruction, and whether the defendant was negligent in permitting it to remain in that condition, were questions of fact that ought, in the view we take of the other question in the case, to have been submitted to the jury.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

HOOKE, J., concurred; MILLER, J., concurred in separate opinion; GAYNOR, J., read for affirmance, with whom JENKS, J., concurred.

MILLER, J. (concurring):

I concur in the opinion of my brother RICH. The incline was intended for a driveway where none existed. It was at the intersection of two streets, where the sidewalk dropped to the crosswalk. It was unusual, and there was nothing to warn pedestrians to look out for it. The plaintiff expected a perpendicular drop, as any one would; instead, her foot came in contact with the smooth, slippery, oval surface of the concrete and she fell. Of course, if she had been going in the other direction it would not have done any harm, but in the direction she was going she was not likely to see it, even had she been using unusual care. I fully agree with my brother GAYNOR on the proposition that the same rule must be applied to the defendant as to the ordinary affairs of men, and that of necessity there will be slight defects and irregularities in streets and sidewalks which it is not required to remove, but this rule does not permit the defendant to set traps for pedestrians, and I think that at

least it was for the jury to say whether a man of ordinary prudence would have anticipated what happened to the plaintiff.

GAYNOR, J. (dissenting):

From the curb there was a concrete incline, six feet wide, down to the cross-walk. The curb was six inches high, and the concrete incline extended out on the cross-walk eighteen inches, measured at its base. This was no obstruction, but a gradual and easy decline from curb to cross-walk. It would be more fit to call it a convenience than an obstruction. No prudent person on seeing it would consider it a dangerous obstruction, and that is the test of liability. To call it such is a refinement that cannot be applied to the ordinary affairs of men. Moreover, the plaintiff did not slip on it; she says that her foot or ankle turned as she stepped on it; and this because of the slight downward slope of her foot. I do not see why it is reiterated that the slope was for a driveway; there is no such evidence. Such declines at crossings are not at all unusual.

The judgment should be affirmed.

JENKS, J., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

In the Matter of the Judicial Settlement of the Account of MARGARETHE C. MARX, as Executrix, etc., of FREDERICK MARX, Deceased.

MARGARETHE C. MARX, Individually and as Executrix, etc., of FREDERICK MARX, Deceased, Appellant; KATHERINE MAUER and Others, Respondents.

Second Department, March 22, 1907.

Will construed — direction that executrix continue partnership business — proper division of income therefrom — estoppel by legatees assenting to division — when executrix should not be charged with payment of tax recoverable from government.

A testator directed his executrix to continue the business of a partnership of which the testator was a member, and "subject to the provisions relative to my co-partnership business" directed the executrix to sell the residue of the estate on such terms as she deemed best and to receive the proceeds thereof and the

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proceeds and income from the partnership business which he bequeathed; one-third to his wife absolutely, one-third in trust, net income to the wife for life with remainder over to other relatives, the remaining one-third to go to the testator's relatives. There being no residuum of the estate above the copartnership business, the executrix divided the income and receipts from the partnership under the terms of the will aforesaid.

On the issue as to whether the income from the partnership should be treated as part of the principal fund of the estate and was to be divided in the same manner,

Held, that such construction should be given;

That in any event adult legatees who had consented to and shared in such division of the estate for five years were estopped from asserting a different basis of division;

That although the executrix had paid a Federal tax not properly chargeable to the estate and which was recoverable from the government, she should not be charged personally with the amount.

MILLER and JENKS, JJ., dissented in part, with opinion.

APPEAL by Margarethe C. Marx, individually and as executrix, etc., of Frederick Marx, deceased, from a decree of the Surrogate's Court of the county of Kings, entered in said Surrogate's Court on the 15th day of February, 1906, judicially settling her accounts as executrix, etc., of Frederick Marx, deceased.

Louis Marshall [*Albert W. Venino* with him on the brief], for the appellant.

Robert D. Benedict, for the respondents.

HOOKER, J.:

Consideration of this appeal requires the construction of the 5th paragraph of the will of the deceased. He died on the 24th day of November, 1901, after having been a member of the firm of Marx & Rawolle for upwards of thirty-one years. On May 19, 1900, Marx & Rawolle entered into an agreement to continue their copartnership for a further term of five years, and by that agreement an elaborate scheme was provided whereby the partnership should not cease upon the death of either or both partners during that five-year period, but should be continued in the event of the death of one partner by his executors or personal representatives, and might be so continued in the case of the death of both partners, in the discretion of the executors of both. By his will, the executors of Marx were given full power to continue the business, and were, by

the 2d paragraph of the will, specifically directed to carry out the provisions of the partnership agreement, so far as the same might be legally done.

After making certain bequests of household property and personal belongings in the 4th paragraph of his will, the testator provided in the 5th paragraph thereof as follows: "Subject to the provisions relative to my copartnership business of Marx & Rawolle, I direct my executors hereinabove named, or such of them as shall qualify, to sell all the rest, residue and remainder of my estate, both real and personal, at public or private sale, on such terms as they shall deem best, and I hereby give them full power to grant and convey the same and to receive the proceeds thereof and also the proceeds of my said copartnership business when wound up and the net income thereof, and I give and bequeath the same as follows:" (1) to his wife, the appellant, one-third absolutely; (2) to his executors in trust, one-third, whose net income during her life should be paid to his wife, the remainder to go to certain of the relatives of the wife and the testator, and (3) the remaining one-third to go to certain of the testator's relatives. There was no residuum of the testator's estate, except the copartnership business of Marx & Rawolle. The executors kept the estate invested in that copartnership business until July 5, 1905, when it was sold, and brought \$283,809.55. From the time of the testator's death to the date of the sale, the net profit of the investment of the testator in the copartnership business amounted to \$125,639.39. This latter amount the executrix received from the firm in installments from time to time, and as she received these moneys they were distributed among the various beneficiaries named in the will and its codicil, in accordance with what she supposed to be their provisions; that is, of this net income she took for herself one-third absolutely; she took a second third as the life interest in a third of the testator's residuary estate, and the balance she divided among those of the testator's relatives who were mentioned in subdivision (c) of the 5th paragraph of the will and the codicil thereto.

The respondents maintain that because she has divided the income of the business in thirds, and distributed it as though it were income of the principal of the estate, the executrix has erred in her construction of the will. The provisions of the 5th paragraph are

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not ambiguous and do not lack in clearness. The language is so plain that recourse should not be had to circumstances or collateral matters to determine the purpose of the testator. His intention is clearly defined in that paragraph. Divested of the phrases and clauses unnecessary to be read in construing the subject-matter, it provides a direction to his executors to sell his residuary estate, subject to the provision in carrying on the partnership business, and they are given power to grant and convey the same and to receive the proceeds thereof, and to receive the proceeds of the partnership business when wound up, *and the net income thereof*; that is, they are given power to receive the proceeds of the net income of the partnership business; and he gives and bequeaths as hereinafter provided, *the same*, that is, of course, the proceeds of the residuum, the proceeds of the copartnership business and the net income. This last item he directed should be distributed in the manner thereafter provided, which was the same method provided to govern the distribution of the proceeds of the partnership. It seems clear, therefore, that the net income from the partnership business was to be treated as part of the principal fund of the decedent's estate, and it was to be divided along with and in the same manner as the residuum and the proceeds of the partnership business. This construction would give to the widow (1) an absolute third in all three funds, and (2) the income during her life of the residuum, the proceeds of the estate when wound up and the net income thereof, that is, she is entitled to the income of a third of the net income of the copartnership business.

Such is, in our opinion, the true construction of the will, for the meaning of the 5th paragraph is plain and unambiguous, and the infants should receive that portion of the estate to which they are entitled under this construction. The legatees who were infants at the time of the testator's death and who have attained their majority since then, may or may not have ratified a practical construction theretofore placed upon the will contrary to the view we adopt of the testator's intent; as to that the record is silent. But as to the adults they seem now to have been estopped from asserting that the construction placed for the past five years upon this will by the executrix and by themselves is the true one. So far as the record shows a substantial portion of the estate has been actually distrib-

uted and received by most, if not all, of the adult legatees prior to the filing of the final account and in conformity with the construction given to the will by the executors. They are, therefore, estopped from asserting a different basis of distribution. (*Chipman v. Montgomery*, 63 N. Y. 221, 234, 235.)

The executrix has paid a tax of \$633.54 to the Federal government, which it now seems was not a proper charge against the estate. It seems to be admitted by counsel for both sides of this controversy that the sum paid may be recovered back under the law as interpreted in *Tilghman v. Eidman* (131 Fed. Rep. 651). While we might consider the direction of the learned surrogate that this amount be surcharged equivalent to a direction that the executrix should seek to recover this amount back and that such course should be pursued, we are of opinion that the surrogate erred in charging this amount personally against the executrix.

The decree of the surrogate should, therefore, be reversed and the proceeding remanded to the Surrogate's Court for further consideration in accordance with the views here expressed, with one bill of costs payable out of the estate to the appellant and one bill to the respondents.

HIRSCHBERG, P. J., and RICH, J., concurred; MILLER, J., read for modification, with whom JENKS, J., concurred.

MILLER, J. (dissenting):

I agree with the conclusion that the surrogate erred in surcharging the account of the executrix with the amount of the Federal inheritance tax paid by her, but cannot assent to the proposition that the 5th clause of the will is too plain to admit of construction; disconnected from its context and literally construed with reference solely to its grammatical construction, it doubtless warrants the interpretation about to be adopted by this court; but I think the entire will, illumined by such circumstances as we have a right to consider, reveals the testator's purpose so clearly that it is our duty to give it effect in spite of inapt or inaccurate modes of expression. (*Phillips v. Davies*, 92 N. Y. 199.)

The residuary estate, the subject of this controversy, consisted of the testator's interest in the assets of the firm composed of himself and Frederick Rawolle; shortly before making his will the testa-

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tor and his said partner entered into new articles renewing the partnership for the definite term of five years from January 1, 1900, and by a supplemental agreement indorsed thereon, which we held applied to the entire articles (*Matter of Marx*, 106 App. Div. 212), the term was extended so as to expire January 1, 1906. It is plain that the primary purpose of said new articles was to provide for the continuance of the business in case of the death of one or both of the partners, for said articles contained explicit provisions to that end; and the apprehension of each was justified by the event, for the testator died November 24, 1901, and his said partner May 18, 1903. Said articles explicitly referred to the interest of each partner as *capital invested by him*, and provided that the *capital* should be kept unimpaired and that the *profits* or losses should be ascertained and divided on January first of each year in the manner stated. The testator was childless, and it is plain that the first object of his solicitude was his aged wife. We come now to the provisions of the will.

In the 1st clause the testator authorized his executors to make *investments* and *reinvestments*, "including the right to purchase and continue the business" theretofore conducted by him with said Rawolle; in the 2d clause he directed them to carry out said partnership agreement. The 3d and 4th clauses are not now material. In the 5th he disposed of his residuary estate. Omitting, for the present, consideration of the language requiring construction, the property which he had in mind was disposed of by four subdivisions, L, M, N and O, respectively, as follows: (L) One-third to his wife absolutely, (M) one-sixth to his executors in trust to pay the income to his wife during her life, remainder to her sisters and a brother, (N) one-sixth to his executors in trust to pay the income to his wife during her life, remainder to his own sisters and a brother, (O) the remaining third to his said sisters and brother. Said brother having died leaving a son, who had a son and six daughters, said testator added a codicil to his will, in which he stated it to be his "particular desire" to provide for the support, maintenance and education of his said grandnieces, and provided, among other things, that one-half of that portion of his estate which otherwise would have been paid to his said nephew should be invested and the income paid to said grandnieces until each attained the age of

twenty-one. It cannot be doubted that the testator intended that his aged wife and the grandnieces, for whose education he was solicitous, should have the immediate enjoyment of the provision for their benefit; he certainly did not intend to postpone such enjoyment until death had intervened in the one case, or the time for education had passed in the other, nor is it easy to suppose that in giving his wife the net income of a third he really intended to limit her to income on the net income of a third. I quote the language which is claimed to require that result:

"*Fifth.* Subject to the provisions relative to my copartnership business of Marx & Rawolle, I direct my executors hereinabove named, or such of them as shall qualify, to sell all the rest, residue and remainder of my estate, both real and personal, at public or private sale, on such terms as they shall deem best, and I hereby give them full power to grant and convey the same and to receive the proceeds thereof and also the proceeds of my said copartnership business when wound up and the net income thereof, and I give and bequeath the same as follows," etc.

It must not be overlooked that the residuary estate and the interest in the copartnership business were identical, that as evidenced both by the will and the partnership articles the testator considered said interest as an investment, which he directed his executors to continue, and he was not amiss in treating the continuance of the partnership business by the executors as an investment by them of his residuary estate, for so the courts have treated similar directions. (*Matter of McCollum*, 80 App. Div. 362; *Johnson v. Lawrence*, 95 N. Y. 154; *Bell v. Hepworth*, 134 id. 442, 448; *Columbia Watch Co. v. Hodenpyl*, 135 id. 430, 434; *Ferry v. Laible*, 31 N. J. Eq. 566, 579.) The will speaks from the death of the testator, and I think it plain from what has already been said that the testator intended to give his wife one-third of his residuary estate absolutely, and the use of another third, and that his purpose was not frustrated by the direction for the continuance of said business. The respondents do not argue that the income from said business was not to be withdrawn until the business was wound up; they concede that it was to be received annually as the partnership articles provided, but insist that when received said income was to be treated not as income, but as additions to the corpus of the estate, to be distributed and

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invested accordingly; if they are right in this contention it cannot be doubted that the will provided for an unlawful accumulation of the income, of which the widow had the life use. (*Thorn v. de Breteuil*, 86 App. Div. 405; 179 N. Y. 64.) The only warrant for their contention is the assumption that the words "copartnership business" and "net income thereof" are the antecedents of the pronoun "same" following. I think said pronoun has the same antecedent as the preceding "same," to wit, "all the rest, residue and remainder of my estate;" that is what the testator clearly had in mind in making the provisions L, M, N and O, and the fact that the draughtsman made a bungling sentence by putting too many parenthetical expressions between the pronoun and its antecedent should not stand in the way of a clearly-expressed intention. The books are full of cases, which I need not cite, in which the courts have gleaned the intention of the testator from less apt language than that now being considered; but if sense is to yield to strict grammatical construction, and if the word "same" does refer to the "proceeds of my said copartnership business * * * and the net income thereof," then I think the expression is to be read distributively as the learned counsel for the appellant contends, and that the testator meant to dispose of said "proceeds" as *principal* and the "net income thereof" as *income* in the manner in which he subsequently directs the disposition of *principal* and *income*, income not to be invested but to be paid out as "income." In any view, the construction adopted by the executrix and long acquiesced in by the interested parties was correct.

JENKS, J., concurred.

Decree of the Surrogate's Court of Kings county reversed and proceedings remitted for further consideration in accordance with opinion of HOOKER, J., with one bill of costs to the appellant and one bill of costs to the respondents, payable from the fund.

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ARTHUR C. BRADY, Respondent, v. JAMES HOGAN and ANTONIO DI GENNO, Appellants.

Second Department, March 1, 1907.

Practice — change of venue granted.

In an action for breach of contracts made and to be performed in the city of New York by parties engaged in business there, an assignee of one party who resides in Rockland county, but who is engaged in business in New York, and who is in the employ of his assignor, is not entitled to retain the venue in Rockland county. This, not on the ground of convenience of witnesses, but because the cause of action arose in New York county.

APPEAL by the defendants, James Hogan and another, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Rockland on the 29th day of October, 1906.

Samuel J. Rawak, for the appellants.

M. B. Patterson, for the respondent.

JENKS, J.:

This is an appeal by the defendants from an order denying their motion to change the place of trial from Rockland county to New York county. If the motion rested solely upon the convenience of the witnesses, we would not disturb the decision of the Special Term. But the record presents other facts which convince us that the motion should be granted. The action is for breach of two contracts made in the city of New York, to be performed there. Those who made the contracts are engaged in business in the city of New York. It does not appear where they reside. This plaintiff, the assignee of the claim, although a *bona fide* resident of Rockland county, is engaged in business in the city of New York, and is in the employ of his said assignors. The defendants and all their witnesses are residents of the said city of New York. The plaintiff only shows, in addition to his residence in Rockland county, that he proposes to call as a witness himself, another who resides in Orange, N. J., and three others whom he does not name, and whose residence he does not specify, but for whom he says it will be more

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convenient if they attend in Rockland, although he gives no reasons for the statement, save that they might be required to attend in New York for successive days until the case is reached, while the case can be stipulated for a day certain in Rockland. In *Navratil v. Bohm* (26 App. Div. 460) the motion to change the place of trial from Queens to New York county was made under section 987 of the Code of Civil Procedure, and we held that the court, regarding the ends of justice, properly granted it, not upon the ground of the convenience of witnesses, but because it appeared that the cause of action arose in the latter county; that the defendant had resided there for many years and the plaintiffs also resided there. The sole difference between the features which we thought were controlling in that case and the similar features of the case at bar is that residents of New York county have assigned their claims to a resident of Rockland county, who, however, is engaged in business in the city of New York and in the employ of his assignors.

The order must be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

HIRSCHBERG, P. J., HOOKER, GAYNOR and RICH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

CASES REPORTED WITH BRIEF SYLLABI

AND

DECISIONS HANDED DOWN WITHOUT OPINION.

FIRST DEPARTMENT, JANUARY, 1907.

WILLIAM J. BROWN, Respondent, v. THE CITY OF NEW YORK, Appellant.

Municipal corporation—liability for injury to pedestrian from falling over a loose flagging lying upon a sidewalk which was being repaired—contributory negligence.

Appeal from a judgment entered upon the verdict of a jury and from an order denying a motion for a new trial.

Judgment and order affirmed, with costs. No opinion. (Ingraham and McLaughlin, JJ., dissenting. Dissenting opinion by Ingraham, J.) Order filed.

INGRAHAM, J. (dissenting): This action was to recover for personal injuries sustained by the plaintiff by tripping on a flagstone on the sidewalk on Second avenue, between Thirty-third and Thirty-fourth streets, in the city of New York. The plaintiff testified that he was injured on the 24th day of October 1902, at about half-past six o'clock in the morning, in front of No. 611 Second avenue, between Thirty-third and Thirty-fourth streets, in the city of New York; that at the time he was walking north on Second avenue, going to work; that there were several persons walking on the avenue, and in order to pass them he turned to the right, tripped and fell over a stone on the sidewalk; that the sidewalk at this point was flagged, but the stone on which he tripped was lying on the flagging, was about two feet wide, two and one-half feet long and three inches thick, and was a foot or more from the curbstone; that he broke his leg four or five inches from the ankle; that he did not see the stone before he stumbled over it; that he was hurrying to get to work by seven o'clock. There was also proof that this stone had been in this location for over two weeks. On behalf of the defendant it was proved that the sidewalk in front of Nos. 609, 611 and 618 Second avenue needed repairs; that prior to October 24, 1902, a firm of contractors was employed by the owners of the abutting property to make the necessary repairs; that a contract was made about November fourth, and the repairs were finished about the fifteenth of November; that these contractors were working in this immediate vicinity during the whole of the month of October. The contractors testified that before they ripped up the sidewalk two flags were crooked, but the rest of the sidewalk was in fair condition; that the new sidewalk was made of asphalt and the old stones were removed. Two of the police officers on the beat testified that several stones were broken, so that there was a slight depression, but there was not

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a loose flagstone on the sidewalk and this was corroborated by other witnesses for the defendant. After the testimony was all in the defendant moved to dismiss the complaint upon the ground that the evidence would not justify a finding that the plaintiff was free from contributory negligence or that the defendant was negligent. This motion was denied and the defendant excepted. Thereupon the court submitted the question to the jury who found a verdict for the plaintiff for \$2,000, and from the judgment entered thereon this appeal is taken. I have considerable doubt as to whether the evidence justified the finding that the defendant was negligent. The sidewalk having become out of repair the owner of the property had determined to replace the flagging with asphalt pavement. A firm of contractors had been employed to do the work, had taken the measurements, and shortly after the accident made a contract to do the work. As the work of ripping up the old pavement did not commence until after the accident, a flagstone on the pavement could not have come from the existing pavement and the new pavement was not to be of flagstones, but an asphalt pavement. At the time of the accident it appeared that workmen were engaged in repairing the building in front of which the plaintiff fell. It was primarily the duty of the owner of the adjoining property to keep in repair the sidewalk in front of the premises, and I think in considering the duty imposed upon the defendant there is distinction between the roadway and the part of the street maintained by the city and the sidewalks that it is primarily the duty of the owners of the abutting property to keep in repair. Of course, the city is bound to see to it that the sidewalks, as well as the streets, are reasonably safe for the public, but it is manifestly impossible for a municipality to prevent any obstruction from being placed upon a sidewalk while an adjoining building is in course of repair. Whatever the obstruction was that caused the plaintiff to fall it would seem a reasonable conclusion that this condition was caused by the repairs being made to the building, and I do not think that it can be said that the city is negligent because the owners of the building obstruct the sidewalk while making repairs to an abutting building and the sidewalk. The primary duty of the city in regard to the streets and their general condition is to make the necessary repairs so as to keep the streets in a safe condition, and for a neglect of that duty the municipality is liable. When the owners of the property undertake to repair their premises and the sidewalk in front thereof the duty of the city during such temporary repairs is somewhat different in relation to the sidewalk and the roadway, the obligation of the city merely being to use reasonable care under the conditions as they from time to time exist. I do not think that the mere fact that the sidewalk is more or less obstructed for a period of two weeks while the work upon the adjoining premises was going on, imposes upon the city a liability for injury caused by such obstruction. However, as the defendant does not take the point that there was no evidence of contributory negligence and as I think that the evidence as it stands does not justify a finding that the plaintiff was free from contributory negligence, it is not necessary to determine the question. According to the plaintiff's testimony, he was walking along this sidewalk in a hurry to get to his work. He was familiar with this locality, passing it almost every morning. As he came in front of this building he saw persons approach-

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ing and turned to the right, stubbed his toe upon a stone and fell. This stone was about a foot and a half from the curb. It was bright daylight, nothing to prevent his seeing the stone, and if he had looked where he was going when he turned towards the curb, he must have seen it. He does not testify whether or not he looked to see where he was going, or if there was any obstruction on the sidewalk, but he says he did not see the stone, and the inference must be that as he did not see it, he did not look. There was no evidence that there was a crowd upon the sidewalk, or that anything distracted his attention, or prevented him from seeing the obstruction, whatever it was, and under such circumstances the case seems to be controlled by the case of *Whalen v. Citizens' Gas Light Co.* (151 N. Y. 70). In that case the plaintiff, while walking along the street, tripped on a flagstone and sustained injuries for which she sought to recover. It appeared that the defendant was engaged in laying a gas pipe across the sidewalk in Court street in the city of Brooklyn, connecting its gas main in that street with the premises on the corner; that it had obtained the consent of the city authorities to remove the flagstones of the sidewalk, and it caused a flagstone next to the building to be removed and placed upon an adjoining flagstone upon the walk; that the space between the two openings was about five feet; that while the walk was in this condition the plaintiff fell upon it, sustaining the injuries to recover for which the action was brought. The accident happened about a quarter before eleven o'clock in the forenoon. The plaintiff testified that her eyesight was very good and that she did not notice the flagstone or the excavation beside it as she went near the place where she fell; that she was looking along the street as she walked. In holding that the plaintiff was guilty of contributory negligence, the court said: "It is the well-settled law of this State that, in actions of this character, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury. * * * If this law is to be recognized and followed we are unable to see how this judgment can be sustained; for to hold otherwise would practically overrule and annul the rule of contributory negligence. As we have seen, it was a bright day and about eleven o'clock in the forenoon. The obstacle over which the plaintiff fell was a large flagstone over four feet in length and three in breadth. There was nothing to obscure her vision; her eyesight was good and she could see as she was walking along the walk. It is not pretended that anything occurred that momentarily obstructed her vision and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard of the precautions usually taken by careful and prudent people. * * * 'The presumption which a wayfarer may indulge, that the streets of a city are safe and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious.'" I do not find that this case has been questioned, or in any way overruled. The same principle was applied in *Strutt v. Brooklyn & R. B. R. R. Co.* (18 App. Div. 134) and in *Dubois v. City of Kingston* (102 N. Y. 219), where the court says: "It may also be remarked that the evidence of the plaintiff tended strictly to show that he was chargeable with

negligence which contributed to the injury. There was abundant room for him to pass by the stepping stone without running against it. A very small portion of the end of the stone upon which he fell obstructed the sidewalk, and being well acquainted with the locality, had he been careful in exercising his faculties he could have avoided the accident. In not doing so he was clearly negligent." It is not claimed here that any other person in the street obstructed the plaintiff's view. His testimony is that seeing persons approaching he turned to the right, towards the curb, and thus brought himself in proximity with this alleged obstruction, which was a foot or a foot and a half from the curb. I can see no distinction between this case and the *Whalen* case, which seems to impose upon a person some care when walking along a sidewalk to look out for obstructions; and in the absence of some evidence to show that an effort, at least, was made to see the obstruction, and when, if such effort had been made, the obstruction would have been apparent and could have been avoided, a verdict that a person injured was free from contributory negligence cannot be sustained. It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event. McLaughlin, J., concurred.

WILLIAM A. BOUTWELL, Appellant, v. THE GLOBE AND RUTGERS FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, Respondent.

Insurance when facts show intention to cancel fire insurance policy — effect of refusal of company to "mark off" policy at request of agent — "mark off" defined — ratification of acts of agent.

Appeal by the plaintiff from a judgment of the Supreme Court, entered upon the decision of a referee, dismissing the complaint.

Judgment affirmed, with costs. No opinion. (Dissenting opinion by Laughlin, J.) Order filed.

LAUGHLIN, J. (dissenting): This is an action on an assigned claim for fire insurance. The assignor of the assignor of the plaintiff, one Moore, owned the steam dredge *Mobile*, which was in Savannah harbor. He also owned various other steam dredges. One Thomason, a broker, represented Moore in procuring insurance on his dredges. On the 7th day of January, 1902, Moore, being of the impression that a \$5,000 policy on the *Mobile*, issued by the Phoenix Company, had been canceled and that certain policies insuring his steam dredge *Fairplay*, which was also at Savannah, were void, wrote Thomason among other things: "I wish policies amounting to \$10,000 on the *Mobile* and *Fairplay*, as \$10,000 on each dredge is all I care to carry at present. I have one policy now No. 2679 Phoenix expiring 6/19/02 though I do not know whether this has been canceled or not. You have all the other policies. Please send policies to me here as early as possible and inform me when they are placed. * * * Would also like to have a memorandum showing what insurance you have of mine and when expiring." The testimony of Thomason is conflicting. He testified both that the records in his office show that a Phoenix policy for \$5,000 on the *Mobile* had been canceled, leaving according to his

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records only \$5,000 insurance on the *Mobile*, and he also testified that his records showed that the policy had not been canceled. His testimony is also somewhat uncertain as to whether he applied for and obtained new policies in the belief that the *Mobile* was only insured for \$5,000, or whether he was uncertain on that point and obtained the insurance as a matter of precaution. However, in what he did, the inference is plain that he was endeavoring to carry out the instructions of his principal, and with that in view, on or about the 6th day of February, 1902, he applied to Messrs. Jamison & Frelinghuysen, who were the agents of the defendant and of the Manufacturers' Lloyds Company, for \$2,500 additional insurance on the *Mobile* in each company, and he obtained a binding slip from each and subsequently received the policy from the Manufacturers' Lloyds. Thomason evidently wrote Moore on the 8th of February, 1902, inclosing some policies. The letter, however, is not in the record. On the 10th of February, 1902, Moore wired Thomason "All policies received your letter eighth were canceled by companies; have they been reinstated? One policy for twenty-five hundred *Fairplay* expired January 27th. Is ten thousand in force on each dredge *Fairplay* and *Mobile*?" and on the same day addressed him by mail, asking if he had had the policies which were canceled reinstated and saying: "I have policies amounting to \$6,000 on dredge *Fairplay* and \$5,000 on dredge *Mobile*. I have also policy No. 2679 Phoenix of Brooklyn for \$5,000 on dredge *Mobile* that was canceled by the Company, on October 29, 1901. Have you had this reinstated? Would like to get this matter straightened out as it is very annoying now trying to understand the matters as it has been over a month since you received this money for this insurance. Am wiring you to-night in regard to this matter though from your previous letters I understand you have bound all the insurance asked for, that is, \$10,000 on each of the dredges *Fairplay* and *Mobile* and am just waiting to get the policies." Upon receipt of the telegram and letter, Thomason, being unable to determine definitely from the records in his office, consulted the agents for the various insurance companies, to ascertain the status of Moore's insurance, as a result of which he ascertained that the Phoenix policy for \$5,000 either had never been canceled or had been reinstated, and that there was then \$10,000 insurance on the *Mobile* in addition to the new insurance of \$5,000 for which he then held the policy of the Manufacturers' Lloyds and the binding slip issued by the defendant. He thereupon on the thirteenth day of February wired Moore, "(The companies) advise me ten thousand in force each dredge" and wrote him at Mobile, Ala., on the same day more fully concerning the delay in ascertaining and communicating the information and inclosed a statement of insurance on the dredges, saying: "I am holding you covered for \$10,000 on each dredge. In fact, on the *Mobile*, I have been \$5,000 over but this policy I shall mark off." Thomason immediately upon discovering that he had taken out more insurance than was needed, caused the Manufacturers' Lloyds policy to be returned to the agents of the defendant, who were also the agents of that company, with an indorsement thereon "Not wanted," and the binding slip issued by the defendant with the indorsement thereon "Mark off." The policy and binding slip were received by the agents of the defendant on the fourteenth day of February and retained until the fifteenth when they

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were returned, together with the policy issued by the defendant in accordance with the binding slip inclosed with a letter as follows: "We are in receipt of the inclosed binders and policies No. 51,578 of the National and 44,618 of the Globe. Policies for both of these binders have been issued and we request you to either retain the inclosed policies or explain to us why it is necessary for you to return them. Yours truly, C. V. M. P. S. We inclose you also policy No. 24,901 of the Manufacturers and beg to advise you that we will not mark these policies off, but will cancel same short rate and bill you for the earned premium for the time the same has been in force. Yours very truly, Jamison & Frelinghuysen." The fifteenth was Saturday, and this letter inclosing the policies and the binding slip was not received by Thomason until Monday, the seventeenth. In the meantime and at three o'clock on the morning of the fifteenth, the *Mobile* was destroyed by fire. The agents of the defendant, upon learning that the fire had taken place, demanded that Thomason return the policies, but he refused to comply with their demand and turned the policies over to his principal, who, after tendering the premium to the company and duly presenting proofs of loss, assigned the policy and his claim thereunder to one Swan, who in turn assigned the same to the plaintiff. The policy contained a provision with respect to cancellation, common to all fire insurance policies, as required by the Laws of New York, as follows: "This policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium." Section 122 of the Insurance Law (Laws of 1892, chap. 690) provided, among other things, that "Any corporation, person, company or association transacting the business of fire insurance in this State shall cancel any policy of insurance upon the request of the insured or his legal representatives, and shall return to him or to such representative the amount of premium paid, less the customary short rate premium for the expired time of the full term for which the policy has been issued or renewed, notwithstanding anything in the policy to the contrary." The learned counsel for the respondent contends that by virtue of the provision of the policy and of the statute quoted, the return of the binding slip by the broker of the insured with the indorsement "Mark off" constituted a cancellation of the policy *ipso facto*, without any action on the part of the company and without its approval or consent. It undoubtedly rested with the insured at any time, by virtue of these provisions, to cancel the policy, and the Court of Appeals long since, under similar provisions, so held. (*Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.) The question here presented, however, is whether the action of the insured clearly showed an intention on his part to cancel the policy. The cancellation contemplated by the provision of the policy quoted and by the statute is a termination of an existing contract which the insured by his request for cancellation recognizes as having been in full force and effect to the time of cancellation, and he becomes liable to the insurance company for the premium at the

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higher rate prescribed for short-term insurance, for the period during which the policy was in force. This, it is quite evident, was not the intention of the insured, as manifested by the act of his broker. What he desired was to have the insurance company consent to mark the policy off its books as if the same had never been issued, in which event he would not be liable for any premium. It is manifest that the agents of the company so understood the request, for they refused to accept the suggestion to mark the policy off, and not only returned the binding slip, but the policy itself, which they had in the meantime executed in accordance with the binding slip, and in the letter returning it they expressly declined to abrogate the contract *ab initio*, but manifested a willingness to cancel it upon the basis of their receiving a premium at the short term rate. The policy bears date the fourteenth day of February, the day the agents of the company received the binding slip back from Moore's broker with the indorsement: "Mark off." But whether it was made out before or after the receipt of the binding slip by the agents of the company does not appear. I think that the language employed clearly indicated that what the broker desired in behalf of his principal was to notify the insurance company, not that this insurance *was no longer wanted*, but that it *was not wanted originally*, and that it had been ordered through mistake or otherwise. It appears by the testimony of the broker for the insured and of a confidential clerk of the agents of the company that the terms "not wanted" and "Mark off" are used by insurance brokers synonymously. The broker for the insured, however, testified that they are used in contradistinction to the term cancellation, when it is desired to have the policy marked off, as if it had never been issued and without any charge for premium. The confidential clerk of the agents for the company testified that they are used when the insured has determined to cancel the policy, and that they constitute a request that it be canceled without charging any premium for the time that it was in force. This view does not seem reasonable, and is impeached by the action of the agents of the company in returning the policy. If they had understood from the words employed that the insured had determined to cancel the policy, and merely requested that the cancellation be without any charge for premium, they would have accepted the cancellation of the policy, and if they did not feel warranted in canceling it without making a charge for the premium, they would have notified him to that effect. The respondent contends that it is unfair to put a construction upon the transaction which gave the insured the option, after he knew that the loss had occurred, to accept the policy and thereby ratify the action of his broker, which may have been unauthorized. On the facts of this case it does seem that the insured obtained an advantage, but it is attributable to the action of the agents of the company. They might have accepted the return of the binding slip as a cancellation of the policy and have asserted a claim in behalf of their principal for the high rate insurance for the period that the binding slip had been in force, and if they are right in the construction for which they now contend, the only question that could then have arisen would have been whether the company was entitled to the premium. This they did not do. They took the position that the policy was in force and that it continued in force until some further action on the

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part of the insured. If, therefore, the action of the broker did not *ipso facto* cancel the policy, it remained in force and the insured was at liberty to accept the return therefor as he did. He could not have received his broker's letter informing him that by mistake over-insurance had been taken out on the *Mobile* until after the fire, so that he had no opportunity of either approving or disapproving the action of the broker in returning the binding slip; but he promptly accepted the action of the agents of the company in declining to "Mark off" the policy and insisting that it remain in force by retaining the policy and presenting proofs of loss almost immediately. In the circumstances it is not at all clear that the agent was not authorized to procure the insurance; but if he were not, the insured had a right, even after the fire, since that was the first time he had an opportunity to do so, to ratify the act of his broker and accept the policy upon the theory that a subsequent ratification is equivalent to original authority. Story Agency [9th ed.], § 445; *Hagedorn v. Oliverson*, 3 M. & S. 485; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343.) It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

Blanche T. Holland, Respondent, v. Frederick A. Reed and Eudoise Barnett (Sued Herein as Eloise Barnett), Appellants.—Judgment and order affirmed, with costs. No opinion. (Houghton, J., dissenting.) Order filed.

Grace Georgette Dickinson, Appellant, v. William I. Seaman, Respondent, Impleaded with Lillie Lane and Others.—Judgment affirmed, with costs. No opinion. Order filed.

Martin L. Cuppels, Respondent, v. Patrick Ryan and Andrew McC. Parker, Appellants.—Judgment and order affirmed, with costs. No opinion. (Ingraham and McLaughlin, JJ., dissenting.) Order filed.

In the Matter of the Application of The Mayor, Aldermen and Commonalty of the City of New York, Relative to Acquiring Title, etc., to the Lands, Tenements and Hereditaments Required for the Purpose of Opening Perry Avenue (Although Not Yet Named by Proper Authority), from Mosholu Parkway to the Southern Line of Woodlawn Cemetery, etc., in the Twenty-fourth Ward of the City of New York. Frederick H. Brandt and John J. Wilson, Appellants; The City of New York, Appellant, Respondent; The Woodlawn Cemetery Association, Respondent.—Reargument ordered.

The People of the State of New York v. Joseph Ferone. The People of the State of New York v. Louie Way.—Motions denied. Orders filed.

The People of the State of New York v. Peter J. Beckert.—Motion granted. Order filed.

The People of the State of New York v. Sam Schwald.—Motion granted. Order filed.

The People of the State of New York v. Lawrence F. Mingey. The People of the State of New York v. George W. Curtis. The People of the State of New York v. Julia Faber. The People of the State of New York v. Louis Levin. The People of the State of New York v. Oscar A. Spier. The People of the State of New York v. Angelo Doddato. The People of the State of New York

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v. Frank Fribbins.—Motions denied on condition that appellants have their appeals ready for argument at the March term. Orders filed.

Gilbert W. Minor v. W. Morton Garden.—Motion granted, with ten dollars costs. Order filed.

Murray Carson v. Shubert Theatrical Company.—Motion granted, with ten dollars costs. Order filed.

In the Matter of Sarah Ann Waters.—Motion denied, upon payment of ten dollars costs, and upon condition that appellant have his appeal ready for argument at the March term. Order filed.

Maurice Berger v. Camille Weidenfeld and Another. Maurice Berger v. Camille Weidenfeld and Another.—Motion denied, with ten dollars costs. Orders filed.

Sidney C. Chambers v. George B. Boyd, as Executor.—Motion denied, with ten dollars costs.

The People of the State of New York v. Charles M. Colmey.—Motion granted. Order filed.

William B. Franklin v. Joseph H. Hoadley.—Motion granted. Order filed.

In the Matter of John Slater, Deceased.—Motion granted, without costs. Settle order on notice.

Sarah Meyerhoffer v. Hyman D. Baker.—Application granted. Order signed.

Margaret O'Connor v. The City of New York. John E. O'Connor v. The City of New York.—Application granted on plaintiffs stipulating that upon affirmation judgment absolute shall be rendered against them. Order signed.

Julius M. Ferguson v. Franklin Blen. Solomon Lederer v. Interurban Street Railway Company. Annie Dillon v. Interurban Street Railway Company. Isaac Weisburg v. Interurban Street Railway Company. Minnie Link v. Interurban Street Railway Company. Edward Walsh v. Union Railway Company. Simon Schonweiter v. Interurban Street Railway Company. John H. Holling v. Interurban Street Railway Company. John Murray v. New York Central and Hudson River Railroad Company. Sayles Zahn Company v. Solomon Sayles (2 cases). Caro G. Hanson v. Eliza Smith. Owen Treanor v. New York Breweries Company. Arthur H. Jones v. Augusta M. Walker. Hugh Hill v. Charles Muller. Carlos Garcia v. Aaron Morris.—Applications denied, with ten dollars costs in each case. Orders signed.

In the Matter of Michael O'Sullivan.—Reference ordered. Order filed.

The People of the State of New York, Respondent, Appellant, v. Jordan L. Snedecor and Others, Appellants, Respondents.—Judgment affirmed, with costs, on the authority of *People v. Weinstock* (ante, p. 168), decided herewith. Order filed.

In the Matter of the Application of the People of the State of New York ex rel. Alexander Werner, Appellant, v. The West Side Brotherly Love Congregation and Benefit Society, Respondent.—Judgment affirmed, with costs, with leave to the relator to withdraw demurrer on payment of costs in this court and in the court below. No opinion. Order filed.

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George H. Fletcher and Others, Respondents, v. Thomas H. Beeckman, Appellant.—Judgment reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered to the sum of \$1,201.69; in which event, judgment as so reduced affirmed, without costs. No opinion. Settle order on notice.

Atwood Violet and Others, Copartners Doing Business under the Firm Name and Style of Atwood Violet & Company, Respondents, v. Paul W. Horbach, Appellant.—Judgment and order modified by reducing the extra allowance to five per cent of the recovery, and as so modified affirmed, with costs to the respondents. No opinion. Settle order on notice.

James A. Campbell, Respondent, v. Sun Printing and Publishing Association, Appellant.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce the verdict to \$2,500; in which event, judgment as so modified and order affirmed, without costs. No opinion. Settle order on notice.

The O. J. Gude Company, Appellant, v. Ely J. Rieser, Respondent.—Judgment affirmed, with costs. No opinion. Order filed.

Mary G. Boeck, Respondent, v. Alfred H. Smith and Harrison B. Smith, Appellants.—Judgment affirmed, with costs. No opinion. Order filed.

Irving E. Raymond, as President of A. A. Vantine & Company, Plaintiff, v. Louis C. Tiffany and Others, Appellants, Impleaded with W. & J. Sloane, Respondent, and Others, Defendants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

London and River Plate Bank, Limited, Respondent, v. George Whitmore Carr, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Allen Fitch, Appellant, v. Emma J. Richardson, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Isaac Schreiber, Respondent, v. Julia Elkin, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Lee De Forest, Appellant, v. Lucile De Forest, Respondent.—Order modified by reducing alimony to fifteen dollars a week, and by reducing counsel fee to seventy-five dollars; and as so modified affirmed, without costs. No opinion. Settle order on notice.

Joseph Personeni, Appellant, v. John McG. Goodale, Individually and as Trustee for Pauline Arnoux, etc., and Others, Defendants, Impleaded with William W. Heroy, as Surviving Partner of the Firm of Heroy & Marrenner, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Rosie Lam, Appellant, v. Louis Lam, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

In the Matter of the Estate of Benjamin Richardson, Deceased. William T. Washburn and Emma Richardson, Individually and as Executors of and Trustees under the Last Will and Testament of Benjamin Richardson, Deceased, Appellants; Viola J. M. Karam and Others, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

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Memphis Trotting Association, Respondent, v. Elmer E. Smathers, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Charles Jungman, Appellant, v. Andrew D. Parker, Respondent.— Order modified by allowing the defendant to serve the answer annexed to the moving papers, and as so modified affirmed, without costs. No opinion. Settle order on notice.

Magee Carpet Company, Appellant, v. James Martin White and Others, Respondents.— Order modified by striking out the words, "or to any other counselor at law or notary public of the State of Pennsylvania," and as so modified affirmed, without costs. No opinion. Settle order on notice.

John W. Willson, Appellant, v. Lillian E. Willson, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Augusta H. Beyer, Respondent, v. The Henry Huber Company, Appellant.— Order modified by striking out the costs in the court below, and as modified affirmed, without costs. No opinion. Settle order on notice.

Louise Koegler, Respondent, v. John C. Koegler, Appellant.— Order modified by striking out the \$100 allowed for back alimony and by reducing the allowance for alimony to \$15 a week, and as modified affirmed, without costs. No opinion. Settle order on notice.

William H. Sullivan and Others v. John McCann and Others.— Motion denied, without costs. Memorandum per curiam. Order filed.

The People of the State of New York v. Emil Henschel.— Motion granted. Order filed.

William Law v. Elizabeth Law and Others.— Motion denied on condition that appellant be ready for argument at the March term. Order filed.

In the Matter of Benjamin Richardson.— Motion denied. Order filed.

In the Matter of Aaron Abramssohn v. Harris Goldberg.— Motion granted, with ten dollars costs. Order filed.

Farrell Lunny v. Malleville W. McClellan.— Motion denied, with ten dollars costs. Order filed.

The People of the State of New York ex rel. Joseph L. Baum v. Edmond J. Butler.— Motion denied, with ten dollars costs. Order filed.

Mary A. Lawrence v. New York Transportation Company.— Motion denied, with ten dollars costs. Order filed.

In the Matter of William R. Hearst v. George B. McClellan.— Motion denied, with ten dollars costs. Order filed.

Florence Nunnally v. New Yorker Zeitung Publishing and Printing Company.— Motion denied, with ten dollars costs. Order filed.

Joseph Otero v. Clyde Steamship Company.— Motion denied, without costs. Order filed.

Einar Chrystie v. George Cromwell.— Motion denied, with ten dollars costs. Order filed.

Harry J. Hearn v. Charles A. Stevens & Brother.— Motion denied, with ten dollars costs. Order filed.

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Elizabeth A. Bull v. William E. Finn.—Motion denied, with ten dollars costs. Order filed.

William W. Whitehead, Jr., v. Trust Concrete Steel Company.—Application denied, with ten dollars costs. Order signed.

Sigmund Rosenthal v. Emil Kouba and Another.—Application denied, with ten dollars costs. Order signed.

Joseph Ortolano v. Degnon Contracting Company.—Application granted. Order signed.

Adolf Prince v. Leo Schlesinger.—Motion granted. Order filed.

In the Matter of Delancey Street.—Motion denied, without costs. Memorandum per curiam. Settle order on notice.

Louise Winter v. Charles Winter.—Motion granted on condition that the respondent gives the stipulation mentioned in memorandum per curiam. Settle order on notice.

THIRD DEPARTMENT, JANUARY, 1907.

HANNAH M. HALL v. CYRUS M. STRONG, as Surviving Trustee under the Will of Eleanor M. Strong, Deceased, Defendant, Impleaded with KATE L. STRONG and Others, as Executors, etc., of Cyrus Strong, Deceased.

Accounting—allegations by executors sued for an accounting that the surviving trustee, to whom they must turn over certain funds, is incompetent are not irrelevant because they reflect upon the character of such trustee.

Appeal by the plaintiff from an order entered in the Tompkins county clerk's office on the 17th day of September, 1906, denying plaintiff's motion to strike out certain matter from the answer of certain defendants as irrelevant and scandalous.

PER CURIAM: The court will not upon this motion determine the sufficiency of this answer. Nor will it determine the rights of the defendants as remaindermen under the will of Eleanor M. Strong. The action seeks an accounting from the defendants for trust funds held by their testator. Such trust funds as may be found would naturally be directed paid to the surviving trustee. The defendants, however, by answer, complain that the surviving trustee is not competent to take charge of said trust funds and that by reason of their interest as remaindermen they ask his removal. If the allegation in defendants' answer be true, and if defendants have an interest as remaindermen in this trust fund they would seem to show good grounds why any sum which they shall be decreed to pay shall not be paid to this surviving trustee, and it is difficult to see why the court should not in this action investigate as to whom these moneys should be paid. Assuming, then, that the issue as to the competency of this surviving trustee is a material issue, the allegations of the answer are not irrelevant, and if relevant, the fact that those allegations reflect upon character is no ground for expunging them from the record. The order should be affirmed, with ten dollars costs. All concurred; Parker, P. J., not sitting. Order affirmed, with ten dollars costs and disbursements.

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Third Department, January, 1907.

Henry E. Dill, Respondent, v. Caroline Dill, Appellant.— Order affirmed, without costs. No opinion. All concurred; Parker, P. J., not sitting.

Victoria B. Dobson, Respondent, v. The Village of Oneida, Appellant.— Judgment and orders unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Clara Duval, as Administratrix, etc., of Alfred Duval, Deceased, Respondent, v. Raquette River Paper Company, Appellant.— Judgment and order affirmed, with costs. No opinion. All concurred, except Kellogg, J., dissenting; Parker, P. J., not sitting.

John Ernest, Appellant, v. The City of Schenectady, Respondent.— Judgment unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Babette Ilch, Respondent, v. The Mutual Benefit Life Insurance Company and New Hampshire Fire Insurance Company, Appellants.— Reargument ordered.

Jennie Kelcey, Respondent, v. William W. Van Keuren, Appellant.— Judgment affirmed, with costs. No opinion. All concurred; Parker, P. J., not sitting.

Knickerbocker Trust Company, as Trustee, Respondent, v. Oneonta, Coopers-town and Richfield Springs Railway Company and Others, Defendants. Henry W. Dean and Others, Respondents, and Daniel M. Lounsbury and Others, Appellants.— Motion for leave to go to the Court of Appeals granted and questions certified as follows: *First.* May a defendant without the service of an answer by himself require a determination of the ultimate rights of himself and a codefendant as between themselves on an answer demanding such determination served on him by such codefendant? *Second.* Did the Special Term under the pleadings and proof herein properly render a judgment determining as between the defendants the ownership of the bonds?

Henry W. Miller, Individually and as Director of Forge Park Company, and Others, Respondents, v. John P. Leo and Isabelle N. Leo, Appellants.— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred; Parker, P. J., not sitting.

In the Matter of the Petition of Hattie M. Glover, Appellant, for the Revocation of Letters of Administration Heretofore Issued to Joseph J. W. Wilson, Respondent, upon the Estate of Helen L. Wilson, Deceased.— Decree unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Edward P. Mullen, Respondent, v. J. J. Quinlan & Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred; Parker, P. J., not sitting.

Sarah Middleworth, Respondent, v. Mary M. Ordway, Individually and as Administratrix, etc., of James M. Ordway, Deceased, and Others, Appellants.— Judgment unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Marcus Mattern, Respondent, v. United Traction Company, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

George W. McCammon, 3d, Respondent, v. The State of New York, Appellant.— Judgment affirmed, with costs. No opinion. All concurred; Parker,

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P. J., not voting, not being a member of this court at the time this decision is handed down.

The People of the State of New York ex rel. George R. Adams, Appellant, v. Jacob F. Stoll and Others, Assessors of the Town of Rosendale, Ulster County, New York, Respondents.—Orders appealed from unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

John Riebennacht, an Infant, by Frank Riebennacht, His Guardian ad Litem, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Mary Sullivan, Appellant, v. Mary C. Bishop Respondent.—Judgment unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Mary E. Sutliff, Respondent, v. The Mutual Fire Insurance Association of Montgomery, Herkimer and Fulton Counties, Appellant.—Judgment and order reversed as against the weight of evidence and new trial granted, with costs to appellant to abide event. No opinion. All concurred; Parker, P. J., not sitting.

Arminda J. Spearbeck, Respondent, v. Robert J. Bell, Appellant.—Judgment unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

William M. Smith, Respondent, v. Luther W. Seaman, Appellant.—Judgment affirmed, with costs. No opinion. All concurred; Parker, P. J., not sitting.

Ellen J. Wynn, Respondent, v. The Provident Life and Trust Company of Philadelphia, Penn., Appellant.—Judgment and order reversed as against the weight of evidence and new trial granted, with costs to appellant to abide event. No opinion. All concurred; Parker, P. J., not voting, not being a member of this court at the time this decision was handed down.

Irving Moyer, Appellant, v. Village of Nelliston, Respondent.—Order modified by inserting as a condition for the granting of a new trial the payment by defendant of the trial fee and disbursements, and as so modified affirmed, without costs to either party. Opinion by Smith, J.* All concurred; Parker, P. J., not sitting.

Ira Blount, as Administrator, etc., of Ira F. Blount, Deceased, v. The City of Troy.—Motion denied.

Hewitt Boice, Respondent, v. The Municipal Telegraph and Stock Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion. Parker, P. J., not sitting.

Maynard N. Clement, as State Commissioner of Excise of the State of New York, Respondent, v. Federal Union Surety Company, Impleaded with Thomas Lunan, Appellant.—Motion for leave to go to Court of Appeals granted, and question certified as follows: Does the limitation in section 18 of the Liquor Tax Law,† as to the amount of the recovery, prevent a plaintiff from taxing costs and disbursements and adding same to the verdict when the verdict is for the full penalty of the bond?

* Memorandum withheld from publication by direction of the court.

† See Laws of 1896, chap. 112, § 18, as amd. by Laws of 1897, chap. 312, and Laws of 1903, chap. 486.—[REP.]

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Fourth Department, January, 1907.

Bernard J. Hoack v. The City of Troy.— Motion denied.

Knickerbocker Trust Company, as Trustee, v. Oneonta, Cooperstown and Richfield Springs Railway Company and Others, Impleaded with Daniel M. Lounsbury and Others, as Executors, etc., and Henry W. Dean and Others, as Reorganization Committee, etc.— Order of reversal settled as proposed by the defendants Lounsbury. Motion to certify additional question to the Court of Appeals denied.

Lena H. Reiche, Administratrix, etc., of Alfred F. Reiche, Deceased, v. New York Central and Hudson River Railroad Company.— Motion denied.

Sarah Taylor Stanley v. James William Stanley.— Motion denied.

Mary Wallace, Appellant, v. Patrick H. Wallace, Respondent.— Order affirmed, without costs. No opinion. All concurred.

Westinghouse, Church, Kerr & Company v. Remington Salt Company.— Motion for leave to go to Court of Appeals granted, and question certified as follows: Did the trial court err in holding as a matter of law that defendant failed to prove facts sufficient to entitle it to the reformation of the contract under the evidence presented to the court and contained in the appeal book herein?

FOURTH DEPARTMENT, JANUARY, 1907.

John L. Alnutt, Respondent, v. Alfred Smith, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concurred.

In the Matter of the Election of Directors for the Niagara Sanitarium Company. Frank J. Carr and Others, Petitioners, Appellants; David A. Morrison and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. All concurred.

William V. McCormack, Appellant, v. Robert F. Leffin, Respondent, Impleaded with George Ullman.— Orders affirmed, with ten dollars costs and disbursements. All concurred, except Williams, J., who dissented on the ground that there was no evidence of any such default as provided for by the statute;* that there was no evidence that the default was satisfactorily excused and no evidence that manifest injustice had been done.

Harry G. Soper v. Associated Press.— Motion for leave to appeal to the Court of Appeals granted, and question for review certified.

Buffalo, Lockport and Rochester Railway Company, Appellant, v. Mary E. Ernest and Another, etc., Respondents.— Decision of motion to dismiss appeal reserved until hearing of appeal from the order of confirmation.

Cora E. Grimes, Respondent, v. Abraham Cuatt, Appellant.— Motion to dismiss appeal granted, with ten dollars costs.

George W. Schneider, Respondent, v. Mary Heilbron and Others, Appellants.— Motion to modify decision and judgment granted.

In the Matter of the Application, etc., of the Rochester, Corning, Elmira Trac-tion Company, for an Order Directing the Board of Railroad Commissioners

* See Laws of 1891, chap. 105, § 470, as amd. by Laws of 1904, chap. 576.
—[REP.]

to issue a Certificate of Public Convenience and Necessity under Section 59 of the Railroad Law.*— Order to show cause, returnable January 28, 1907, granted.

Henry P. Wood, Appellant, v. John A. Wood, Respondent.— Judgment and order affirmed, with costs. All concurred.

Mariarosa Dipietro, Respondent, v. The Delaware, Lackawanna and Western Railroad Company, Appellant.— Judgment and order reversed and new trial ordered, with costs to the appellant to abide the event, unless the plaintiff stipulates to reduce the verdict to the sum of \$100 as of the date of the rendition thereof, in which event the judgment as so modified and orders are affirmed, without costs of this appeal to either party. All concurred, except McLennan, P. J., and Robson, J., who voted for reversal on the ground that there is no evidence which would entitle the plaintiff to a recovery for humiliation, which was the only question of damage submitted to the jury.

Patrick J. O'Connor, Respondent, v. Henry P. Burgard, Appellant.— Defendant's exceptions sustained and motion for new trial granted, with costs to the defendant to abide event. Held, that the evidence failed to establish actionable negligence on the part of the defendant, in that the accident which caused plaintiff's injury was not of such a character that an ordinarily prudent person would have anticipated it as liable to happen, and that there was no negligence attributable to defendant in failing to guard against the possibility of its occurrence. All concurred, except Kruse, J., who dissented. Order denying motion for new trial on the ground of newly-discovered evidence affirmed, with costs. All concurred.

Adelaide Fromm, Respondent, v. Rochester Railway Company, Appellant.— Judgment and order affirmed, with costs. All concurred, except Robson, J., who dissented.

Asa B. Dygert, Appellant, v. Clarence W. Austin and Cora B. Raynor, as Executors, etc., of Joseph Hills, Deceased, Respondents.— Judgment affirmed, with costs. All concurred.

Fred E. Oremus, Plaintiff, v. John K. Fellows, as President of Lock City Tent No. 240, Knights of Maccabees, Defendant.— Defendant's exceptions sustained and motion for new trial granted, with costs to the defendant to abide the event. Held, that the answer raised issues of fact and that the direction of the verdict was improper. All concurred, except Spring, J., not voting.

Henry Denison, Appellant, v. Syracuse Rapid Transit Railway Company, Respondent.— Judgment and order affirmed, with costs. All concurred.

Michael W. O'Connell, Respondent, v. Syracuse Rapid Transit Railway Company, Appellant.— Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over upon payment of the costs of the demurrer and of this appeal. All concurred.

Antoinette Myers and Others, Appellants, v. Myron Peckins, as Executor, etc., of Solomon Crittenden, Deceased, and Others, Respondents.— Judgment affirmed, with costs. All concurred, except Williams, J., who dissented on the ground that the question of testator's competency should have been submitted to the jury.

* Laws of 1890, chap. 565, § 59, added by Laws of 1892, chap. 676, and amended by Laws of 1895, chap. 545.—[REP.]

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Fourth Department, January, 1907.

Kendrick Taylor, Respondent, v. John W. Barnett, as Executor, etc., of Betsey A. Barnard, Deceased, and Herbert H. Paddock, Appellants.—Judgment affirmed, with costs. All concurred, except Williams, J., who dissented.

Sadie Coleman, as Administratrix, etc., of Maurice Coleman, Late of the City of Buffalo, in the County of Erie, New York, Deceased, Appellant, v. Delaware, Lackawanna and Western Railroad Company, Respondent.—Judgment and order affirmed, with costs. All concurred, except Spring, J., who dissented, and Kruse, J., not voting.

Harry Howell, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order reversed with* new trial ordered, with costs to the appellant to abide the event unless the plaintiff stipulates to reduce the verdict to the sum of \$2,000 as of the date of the rendition thereof, in which event the judgment as so modified and the order are affirmed, without costs of this appeal to either party. All concurred, except Kruse and Robson, JJ., who dissented and voted for affirmance.

Dudley Carr, Respondent, v. Auburn and Syracuse Electric Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Nicholas C. Fries, Appellant, v. John P. Fries and Others, Respondents.—Interlocutory judgment affirmed, with costs. All concurred.

Della Dorner, an Infant, by Henry Dorner, Her Guardian ad Litem, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred, except McLennan, P. J., and Williams, J., who dissented on the ground that the evidence fails to show actionable negligence on the part of the defendant or freedom from contributory negligence on the part of the plaintiff.

Edwin C. Larned, Respondent, v. Oliver Watson, Appellant.—Judgment and order affirmed, with costs. All concurred, except McLennan, P. J., who dissented on the ground that there is no evidence that the alleged failure of the defendant to perform his contract resulted in damage to the plaintiff, and on the further ground that plaintiff waived any such breach on the defendant's part.

Arthur Worden, Respondent, v. Clarence D. Bentley, Appellant.—Judgment and order affirmed, with costs. All concurred.

Mary Agnes Barry, an Infant, by James G. Barry, Her Guardian ad Litem, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Order affirmed, with costs. All concurred; Robson, J., not sitting.

Mathew Wall, Respondent, v. The Skaneateles Paper Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Henry Loftie, Appellant, v. William B. Kirk, Respondent, Impleaded with Charles E. Hubbell and Others.—Judgment affirmed, with costs. All concurred.

Cora E. Ruleff, as Sole Administratrix, etc., of Charles Ruleff, Deceased, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment and order affirmed, with costs. All concurred, except Spring, J., who dissented; Robson, J., not sitting.

May L. Driscoll, as Executrix, etc., of William H. Driscoll, Deceased, Respondent, v. American Fidelity Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. All concurred.

Eliza Francisco, Appellant, v. Joseph T. Talbert and Nicholas Casey, Respondents, Impleaded with Lawrence Kanna.— Judgment affirmed, with costs. All concurred.

The People of the State of New York ex rel. Betsy Pullman, as Executrix, etc., of Willard Pullman, Deceased, Appellant, v. R. Fenton Seeley and Others, as Assessors of the Town of Waterloo, Seneca County, New York, Respondents.— Order modified by striking therefrom the last clause and inserting in lieu thereof "with fifty dollars costs and disbursements to the relator," and as so modified the said order is affirmed, with ten dollars costs and disbursements on this appeal. The costs herein specified are hereby awarded against the town of Waterloo. All concurred.

Jerre T. Durham, Respondent, v. The Area or Territory of Sylvan Beach, Appellant.— Order reversed, with ten dollars costs and disbursements, and motion granted, without costs. Held, that the summons was not served in accordance with the provisions of defendant's charter.* All concurred.

Mary Forkhamer, as Administratrix, etc., of Joseph Forkhamer, Deceased, Appellant, v. The Haberle Crystal Spring Brewing Company, Respondent.— Judgment and order affirmed, with costs. All concurred, except Kruse, J., who dissented.

Mary Cunningham, as, etc., Respondent, v. Gould Paper Company and Another, Appellants.— Motion for leave to appeal to the Court of Appeals denied, with ten dollars costs.

Walter S. Coffin, Respondent, v. James J. Barber and Another, Appellants.— Motion for leave to amend decision and order denied, with ten dollars costs and disbursements.

Theresa Rossenbach v. Supreme Court of the Independent Order of Foresters.— Motion for reargument denied, with ten dollars costs. Motion to amend decision and order denied.

Margaret Wendell v. Michael J. Leo.— Motion for reargument denied, with ten dollars costs and disbursements.

Frank A. Lord, Respondent, v. J. G. White & Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

William D. Ingersoll, Appellant, v. Henry B. Saunders and Neil McCloskey, Respondents.— Judgment and order affirmed, with costs. All concurred.

Albert J. Wheeler, as Receiver of the German Bank, Respondent, v. Eugene A. Georger, Appellant.— Order affirmed, with ten dollars costs and disbursements, and motion to dismiss appeal denied, without costs. All concurred.

Richard Ellison, Plaintiff, v. The City of Auburn, Defendant.— Plaintiff's exceptions overruled, motion for a new trial denied, with costs, and judgment ordered for the defendant on the nonsuit. All concurred, except Kruse, J., who dissented.

* See Laws of 1896, chap. 812, § 22, as renumbered and amd. by Laws of 1901, chap. 361.—[*REF.*]

App. Div.]

Fourth Department, January, 1907.

Buffalo Foundry Company, Respondent, v. Frank Wolfe, as President of Iron Molders' Union No. 84, Appellants.— Order affirmed, with ten dollars costs and disbursements. All concurred.

John H. Faulkner, Appellant, v. Nellie M. Faulkner, Respondent.— Order affirmed, with ten dollars costs and disbursements. All concurred.

Levy Aldrich, Appellant, v. Nellie Aldrich, Respondent.— Judgment affirmed, with costs. All concurred, except Williams, J., dissenting.

Elizabeth Bird Williams and Others, Respondents, v. Albert G. Hatch, Appellant.— Judgment and order affirmed, with costs. All concurred.

W. A. Case & Son Manufacturing Company, Respondent, v. Jewett & Company, Appellant.— Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over upon payment of the costs of the demurrer and of this appeal. All concurred.

Braunslaus Ptak, an Infant, etc., Respondent, v. Syracuse Rapid Transit Railway Company, Appellant.— Judgment and order affirmed, with costs. All concurred.

Charlotte Beyer, Respondent, v. The City of North Tonawanda, Appellant.— Judgment and order affirmed, with costs. All concurred.

John Peter Schraenkler, Respondent, v. National Car Wheel Company, Appellant.— Judgment and order affirmed, with costs. All concurred; Robson, J., not sitting.

Elizabeth A. Leahy, Respondent, v. William R. Brace and Alice Brace, Appellants.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event. All concurred.

George L. Knight, Respondent, v. City of Buffalo, Appellant.— Judgment affirmed, with costs. All concurred.

The People of the State of New York, Appellant, v. John Ritenburg, Respondent.— Judgment and order affirmed, with costs. All concurred.

Eugene E. Bentley, Respondent, v. Horace L. Bronson and John H. Rease, Appellants.— Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event. All concurred, except McLennan, P. J., and Williams, J., who dissented.

In the Matter of the Application of Buffalo, Lockport and Rochester Railway Company, etc.— Motion denied, with ten dollars costs.

The People of the State of New York, Respondent, v. William Huson, Appellant.— Motion for reargument denied.

John Durant, as, etc., v. Village of Solvay.— Motion for leave to appeal to the Court of Appeals granted.

Andrew Langdon, Respondent, v. The Northwestern Mutual Life Insurance Company, Appellant.— Decision and order entered herein on the 28th day of December, 1906, resettled and made to provide that the judgment and order appealed from be reversed and a new trial ordered, with costs to the appellant to abide the event.

FIRST DEPARTMENT, FEBRUARY, 1907.

THOMAS L. GREEN, Respondent, v. JAMES G. SMITH, Appellant.

Sale — mutual mistake — when corrected.

Appeal from a judgment entered upon a verdict directed by the court.

PER CURIAM: The case presented a question of fact which should have been submitted to the jury. There was evidence which would have sustained a finding that both parties agreed upon a sale on the basis testified to by the defendant, and that the amount which defendant in fact agreed to pay was the result of an error of calculation. If this should be found to be the case, since the position of plaintiff has not been changed in consequence of the error, there is no reason why the mistake should not now be corrected.

The judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

Present — Patterson, P. J., McLaughlin, Houghton, Scott and Lambert, JJ.

Judgment reversed, new trial ordered, costs to appellant to abide event. Order filed.

CAROLINE HACKER, Appellant, v. HENRY S. HACKER, Respondent.

Appeal from a judgment dismissing the complaint after a trial at Special Term.

PER CURIAM: The judgment entered in this action should be modified by inserting at the foot of it, pursuant to the written stipulation of the respective parties, as follows: "It is further ordered, adjudged and decreed that the plaintiff, Caroline Hacker, is entitled to have the bodies of her husband, Elkan S. Hacker, and of her children, Solomon Hacker and Jennie Hacker, deceased, remain permanently entombed in plot No. 6, section 18, Mount Hope Cemetery, Jamaica, Long Island, where they are now buried. And also that the plaintiff, Caroline Hacker, is entitled to have her own body interred in said plot at the time of her decease. And that she is further entitled to have the bodies of such of her children as may die or (be) married interred in said plot." And as thus amended affirmed, without costs to either party.

Present — Patterson, P. J., McLaughlin, Houghton, Scott and Lambert, JJ.

Judgment modified as stated in opinion, and as modified affirmed, without costs to either party. Settle order on notice.

Leo Schlesinger v. Charles O. Burns.—Motion denied on payment of ten dollars costs and on payment of an additional ten dollars, leave given to apply below to open default. Order filed.

In the Matter of Patrick Pender, Deceased.—Motion denied on payment of ten dollars costs and on condition that appellant be ready by April term. Order filed.

Anna Olsen, as Administratrix, v. The Royal Company and Others.—Motion denied on condition that appellant be ready by April term. Order filed.

William L. Crow v. The New York Central and Hudson River Railroad Company.—Motion granted, with ten dollars costs. Order filed.

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Frederick Eggers v. Metropolitan Life Insurance Company.— Motion granted, with ten dollars costs. Order filed.

August A. Kimmel v. Lydia Kimmel.— Motion granted, with ten dollars costs. Order filed.

Thomas Gavin v. New York Contracting Company.— Motion granted, without costs. Order filed.

John G. Oldmixon v. Stephen N. Severance and Another.— Motion denied. Order filed.

Dierck Schomacker v. Sophia Michaels.— Motion for leave to appeal to Court of Appeals granted. Order filed.

Sophia Douglas v. Metropolitan Street Railway Company.— Motion granted. Order signed.

John B. Wickery v. Interborough Rapid Transit Company. Annie Duffy v. Interurban Street Railway Company. Herman Berns v. New York City Railway Company. Empire Electric Sign Company v. Otto Strack. Samuel J. Mashkowitz v. Maurice O'Connell. Herman Rossow v. Edward Burke and Another. Ignatz I. Rosenberg v. Randolph Clowes Company. Clara Wolfsohn v. Morris Solomon.— Applications denied, with ten dollars costs. Orders signed.

National Contracting Company v. Hudson River Water Power Company.— Memorandum for counsel.

In the Matter of Rapid Transit Board. Brooklyn and Manhattan Loop.— See memorandum for commissioners and counsel.

In the Matter of Rapid Transit Board. Park Avenue Section.— Order settled. See memorandum per curiam.

Benjamin Altman, Doing Business as B. Altman & Company, Respondent, v. Adele Meroni, Doing Business as Madame Laurent, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. (Ingraham, J., dissenting.) Order filed.

Samuel Fibel, Respondent, v. Noah Kahan, Appellant.— Judgment affirmed, with costs. No opinion. Order filed.

Peter A. Juley, Respondent, v. Town Topics Publishing Company, Appellant.— Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. No opinion. Order filed.

Marshall J. Gasquet, Respondent, v. A. Pennington Whitehead and Others, Appellants.— Judgment and order affirmed, with costs. No opinion. Order filed.

James J. Carey, Respondent, v. The City of New York, Appellant.— Judgment affirmed, with costs. No opinion. Order filed.

Sarah S. Kenny, as Administratrix of John H. Kenny, Deceased, Appellant, v. The Central Railroad Company of New Jersey, Respondent.— Judgment affirmed, with costs. No opinion. Order filed.

Hans Weniger, Respondent, v. The Fourteenth Street Store, Appellant.— Judgment and order affirmed, with costs. No opinion. Order filed.

Charles G. Cornell, Jr., and Richard W. Underhill, Copartners, Trading under the Firm Name and Style of Cornell & Underhill, Appellants, v. Mary E. Way-

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dell and Anderson Waydell, Respondents.— Judgment affirmed, with costs. No opinion. Order filed.

Frank M. MacDonald, Respondent, v. General Electric Inspection Company, Appellant.— Judgment and order affirmed, with costs. No opinion. Order filed.

Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, Appellant, v. John A. Stewart, Respondent.— Judgment affirmed, with costs on authority of 105 Appellate Division, 478. Order filed.

John G. Carlisle, Respondent, v. National Surety Company, Appellant.— Judgment affirmed, with costs. No opinion. Order filed.

William Wheeler Smith, Respondent, v. Amzi L. Barber, Appellant.— Judgment and order affirmed, with costs. No opinion. Order filed.

Frank T. Arms, Appellant, v. Navarre Hotel and Importation Company, Respondent.— Judgment affirmed, with costs. No opinion. Order filed.

Eva Van Emden, Respondent, v. Central Consumers Wine and Liquor Company, Appellant.— Judgment and order affirmed, with costs. No opinion. Order filed.

Wilbur F. Swayze, Appellant, v. The New York and Ohio Coal Mining Company and Others, Respondents, Impleaded with Others.— Judgment affirmed, with costs. No opinion. Order filed.

Henry Z. Kressler, Appellant, v. Interurban Street Railway Company, Respondent.— Judgment and order affirmed, with costs. No opinion. Order filed.

Bonneville Portland Cement Company, Respondent, v. John O'Brien and Others, Appellants.— Judgment and order affirmed, with costs. No opinion. Order filed.

The People of the State of New York ex rel. Dora A. Lehmkuhl and Others, Respondents, v. Edward M. Grout, as Comptroller of the City of New York Appellant.— Orders affirmed, with costs and disbursements. No opinion. Order filed.

J. Quintus Cohen, as Trustee, etc., of John T. Lee, Bankrupt, Respondent, Appellant, v. Ogden D. Budd, as President of the Consolidated Stock and Petroleum Exchange of New York, Appellant, Respondent.— Judgment affirmed, without costs. No opinion. Order filed.

John W. Sterling, as an Executor, etc., of Edwin S. Chapin, Deceased, Respondent, v. Albert K. Chapin, Individually and as an Executor, etc., of Edwin S. Chapin, Deceased, Appellant.— Judgment affirmed, with costs. No opinion. (Ingraham, J., dissenting.) Order filed.

Law Reporting Company, Appellant, v. Dominion Coal Company, Limited, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

New York Life Insurance and Trust Company, Plaintiff, v. Isaac Polstein, Impleaded with Wolf Sheitel, Respondent, and Henry Brill, Defendant.— Order affirmed, with costs. No opinion. Order filed.

In the Matter of the Estate of Patrick A. Fogarty, Deceased. Sarah A. O'Reilly, as Executrix of and Trustee under the Last Will and Testament of Hugh O'Reilly, Deceased, Appellant; Patrick Skelly, as Surviving Trustee under the Last Will and Testament of Patrick A. Fogarty, Deceased, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

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Silas Swartz, Appellant, v. John Crosby Brown and Others, Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

John W. Schaefer, Respondent, v. Henri Etienne Boule, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Georgianna Dickerman, Respondent, v. The City of New York, Appellant.— Judgment and order reversed and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce verdict to \$5,000, in which event judgment as so modified and order affirmed, without costs; Patterson, P. J., and Ingraham, J., dissenting on opinion of Ingraham, J., on former appeal.* Settle order on notice.

George Hoffman, as Administrator, etc., of Julia Huf, Deceased, Appellant, v. Union Dime Savings Institution, Respondent.— Judgment and order affirmed, with costs. No opinion. (McLaughlin, J., dissenting.) Order filed.

James Henry, an Infant, by Christopher Henry, His Guardian ad Litem, Respondent, v. Interurban Street Railway Company, Appellant.— Order granting extra allowance reversed, without costs. Judgment and order reversed and new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs etc., to the sum of \$3,732.95; in which event judgment as so reduced and order denying motion for new trial affirmed, without costs. No opinion. (Laughlin, J., dissenting.) Settle order on notice.

Esther Goldman, Respondent, v. Frank G. Swartwout, Appellant.— Judgment and order affirmed, without costs. No opinion. (Houghton, J., dissenting.) Order filed.

Henry G. Peters, Respondent, v. The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, Appellants.— Judgment affirmed, with costs. No opinion. Order filed.

Elise M. J. Klenke, née Fernschild, Respondent, v. The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, Appellants.— Judgment modified by reducing the amount awarded for fee damage to \$4,000, and by reducing the judgment as entered for fee damage, including costs, allowance, etc., to the sum of \$2,212.77, and as modified affirmed, without costs. No opinion. Settle order on notice.

Guiseppi Abia, Appellant, v. Arthur Bollerman, Respondent.— Order affirmed, with costs. No opinion. Order filed.

Samuel Molker, an Infant, Appellant, v. The City of New York, Respondent.— Judgment and order affirmed, with costs. No opinion. Order filed.

In the Matter of the Application of the City of New York, Respondent, Relative to Acquiring Title, etc., to Macomb's Road (Although Not Yet Named by Proper Authority) from Its Junction with Jerome Avenue Opposite Marcy Place to Macomb's Road North of East One Hundred and Seventieth Street, in the Twenty-third and Twenty-fourth Wards, Borough of Bronx, in the City of New York. Edward L. Woolf and Others, Appellants; Edward C. Striffler,

* See *Dickerman v. Weeks* (108 App. Div. 257). — Rmp.

as Executor, etc., of Christian Striffler, Deceased, Respondent.— Order affirmed, with ten dollars costs and disbursements to each respondent. No opinion. Order filed.

Frederick Y. Dalziel, Appellant, v. Press Publishing Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Annie M. Shepherd, Respondent, v. Walter S. Shepherd, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Knickerbocker Trust Company and William B. Randall, as Trustees, Respondents, v. O'Rourke Engineering Construction Company, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Motion dismissed. Order filed.

In the Matter of the Estate of Matthew Byrnes, Deceased. Joseph C. L. Byrnes, Appellant; United States Mortgage and Trust Company, as Substituted Trustee under the Will of Matthew Byrnes, Deceased, Respondent.— Order affirmed with ten dollars costs and disbursements. No opinion. Order filed.

Richard F. Outcault, Appellant, v. Victor W. Cupples and Arthur T. Leon, Copartners, Doing Business under the Firm Name and Style of "Cupples & Leon," Respondents.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Mary D. Daly and Others, as Executors, etc., of Augustin Daly, Deceased, Appellants, v. Gus Hill, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

In the Matter of the Application of Charles Mayer, Appellant, for a Peremptory Writ of Mandamus against The Northern Union Gas Company, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Louis L. Seaman, Respondent, v. John E. Milholland, Appellant.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Caroline Baldwin, Respondent, v. Samuel S. Baldwin, Appellant.— Order modified as stated in order, and as modified affirmed, without costs. No opinion. Order filed.

Eleanor Rawles Reader, Appellant, v. James B. Haggin, Respondent. (Nos. 1 & 2).— Orders affirmed, with ten dollars costs and disbursements. No opinion. Orders filed.

Athole B. Reader, Appellant, v. James B. Haggin, Respondent. (Nos. 1 & 2).— Orders affirmed, with ten dollars costs and disbursements. No opinion. Orders filed.

Ruby Helen Blake, Respondent, v. Ernest Linwood Blake, Appellant.— Order modified as stated in order, and as modified affirmed, with ten dollars costs and disbursements to respondent. No opinion. Order filed.

In the Matter of the Application of Aaron E. Katz, Appellant, for a Writ of Peremptory Mandamus against Peter J. Dooling, Clerk of the County of New York, Respondent.— Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

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Cerro De Pasco Tunnel and Mining Company, Appellant, v. James B. Haggin, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Hugh Hill and Eugene Miner Taylor, Copartners, Doing Business Under the Firm Name and Style of Edward Hill's Son & Company, Respondents, v. Henry C. Muller, Defendant, and Charles Muller, Appellant, Copartners, Doing Business Under the Firm Name and Style of H. C. Muller & Company.—Orders affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

Joseph L. Torres, Respondent, v. Andrew Fernandez and Joseph M. Fernandez, Defendants. Tiburcio Bea and Others, as Surviving Partners of the Firm of Bea, Bellido & Company, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. Order filed.

SECOND DEPARTMENT, FEBRUARY, 1907.

In the Matter of the Application of Alfred Lotary for Admission to the Bar.—Application granted. Present—Woodward, Jenks, Gaynor and Rich, JJ.

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Survival of action for damages for failure to give preference under Civil Service Law.

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APPEAL.

1. *Findings not incorporated in report.* A proposed finding of fact, although marked by a referee, will not be considered on appeal if not incorporated in the report. *Holmes v. Seaman* (No. 2), 881.

2. *Transactions with deceased.* Evidence of transactions with one deceased, incompetent under section 829 of the Code of Civil Procedure, must be objected to as inadmissible under the statute in order that the error may be available on appeal. *Hamlin v. Hamlin*, 491.

3. *Case on appeal — requests to find not part of judgment roll.* In trials by the court or before a referee, the formal decision directing a judgment must contain every finding of fact made by the justice or referee, and no fact not thus incorporated in the decision forms any part of the judgment roll or the case on appeal, or can be considered for any purpose by the appellate court. A party has no right to incorporate in a judgment roll or case on appeal his requests to find submitted to the court or referee under section 1023 of the Code of Civil Procedure, unless the court refuses to find, in which case the requests refused may be inserted in the appeal book, unless incorporated in the decision.

The practice of incorporating the requests to find is without authority and is discountenanced. Propositions which are found should be inserted in the decision, and if by inadvertence they are omitted, the decision should be resettled so as to embrace them, and a defeated party wishing to take advantage upon appeal of a finding so made must see to it that the finding is properly incorporated in the decision.

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It follows that an appellant can take no advantage of any supposed inconsistencies between the facts as found at his request and those appearing in the formal decision. *Ellerman v. Hyman*, 519.

4. *From order — opinion below not considered.* On an appeal from an order setting aside a verdict, it is the order which governs the appellate court and not the opinion of the court below. *Coffey v. New York City Railway Co.*, 670.

5. *Appeal from order of justice of Special Sessions sitting in Children's Court.* Appeals from the Court of Special Sessions in the borough of Brooklyn are to the Appellate Division. But appeals from orders by the Children's Court of that city in cases of charges against children not amounting to crime, where the justices of said court act as magistrates, lie to the County Court. *People v. O'Neill*, 826.

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Submission of case on erroneous theory available under exception to refusal of a new trial.

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ARBITRATION.

1. *When submission to arbitration warrants judgment for interest — right to interest matter of law.* When the owner of lands and a contractor who has erected a building thereon submit controversies as to amounts due under the contract and for extra work to arbitration pursuant to chapter 17, title 8 of the Code of Civil Procedure, and submit all manner of actions, causes of actions, suits, controversies, claims and demands whatsoever now pending and existing between them, the arbitrator has jurisdiction to determine whether the contractor is entitled to interest on the sum found due, for that issue is clearly within the terms of the submission.

An express submission of the issue as to the right to interest is not necessary in order to permit a recovery thereof, for as a matter of law a right to interest follows a claim for a demand capable of computation.

It is only where the amount due is incapable of being ascertained by computation that an allowance of interest is improper.

The presumption is that the award was correct and, in the absence of the evidence, that facts were disclosed that warranted the allowance of interest on the sum found to be due. *Matter of Burke*, 477.

ARBITRATION — Continued.

2. *Appeal — when decision of arbitrator final.* On appeal from the decision of an arbitrator the Appellate Division cannot review the merits of the decision when there is nothing on the face of the award showing that the arbitrator decided wrongly.

The court is limited in its review by sections 2373, 2374 and 2375 of the Code of Civil Procedure, and is confined to the grounds specified in those sections. *Id.*

ASSAULT.

Actions for assault and slander cannot be united.

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ASSAULT AND BATTERY.

Liability of municipality for unauthorized arrest at instigation of street cleaning department. The plaintiff was arrested for sweeping refuse into a street of the city of New York in violation of section 1 of the ordinance of March 11, 1902, approved March 18, 1902. The arrest was made by a policeman without a warrant who acted at the request of an employee of the street cleaning department. Neither the officer nor the employee witnessed the offense. The employee requested the arrest under instructions of the street cleaning department, which required employees who "witnessed" violations of the ordinance to cause the arrest of the offender by the nearest policeman and to become a witness in the case.

Held, that although under the circumstances the arrest was authorized neither by the instructions of the street cleaning department nor by the law, the arrest was not made by an employee of the street cleaning department but by the police;

That as the police department is one of its governmental agencies the city is not liable for the acts of policemen under the doctrine of *respondet superior*;

That the arrest could not be considered to have been made by the police as an adjunct of the street cleaning department. *Clayman v. City of New York*, 565.

ASSIGNMENT.

By beneficiary of interest in gratuity fund contrary to provisions therein.

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Action by vendee under an executory contract to sell lands against his assignee and the vendor to determine title.

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ATTORNEY AND CLIENT.

1. *Action to enforce attorney's lien — when defendant settling action bound by lien of plaintiff's attorney.* A plaintiff's attorney upon bringing action has a lien by virtue of section 66 of the Code of Civil Procedure, which cannot be affected by any settlement between the parties before or after judgment. Hence, when before judgment the defendant settles the action with the plaintiff without knowledge of his attorney, the lien attaches to the fund and the defendant makes payment to the plaintiff at its peril. *Oishei v. Pennsylvania Railroad Co.*, 110.

2. *Same — notice.* The defendant is charged with constructive notice of the lien, and it is its duty to ascertain the amount of the lien and retain such sum for the benefit of the attorney. *Id.*

3. *Jurisdiction — when court may determine lien as against foreign defendant.* When a foreign defendant appears in an action brought in this State by a plaintiff who does not appear to be a non-resident, our courts may enforce the lien of the plaintiff's attorney.

When a foreign defendant served in this State has appeared in a suit in the courts of this State, and it is thereafter sought to enforce an attorney's lien against it, it cannot maintain that, being a foreign corporation, the money upon which the lien attaches is not within this State. *Id.*

4. *Same — party — process — when plaintiff's client may be served by substituted service.* In such action to enforce the lien the client himself is a necessary party,

ATTORNEY AND CLIENT — Continued.

being entitled to be heard as to the existence of the lien and the attorney's right to enforce it, but when the client has departed from the State, he may be served by substituted process, for the action is *in rem*. *Id.*

5. *Judgment.* When in such action to enforce an attorney's lien it appears that the client has departed from the State and is financially irresponsible, it is not error for the judgment to provide that an execution be issued against the client and returned unsatisfied before the defendant is bound to pay. *Id.*

6. *Concurrent jurisdiction.* The removal of an action to the United States Circuit Court before settlement does not prevent the Supreme Court from enforcing an attorney's lien which attached upon the commencement of the action in that court, if the court has obtained jurisdiction of the defendant. *Id.*

7. *Inspection of papers in attorney's possession — attorney acting as business agent not privileged.* When it appears that the alleged contract of sale was made by the defendants' attorney in their absence and that he was acting as their business agent rather than in his professional capacity, the privilege of professional secrecy under section 885 of the Code of Civil Procedure does not obtain.

The privilege does not extend to business transactions to be negotiated by the attorney with a third party, concerning which the client neither requires nor receives professional advice.

If an owner of property employs a counselor at law instead of a real estate agent to negotiate a sale, he does not thereby receive immunity from disclosing the authority conferred upon the attorney.

If the client can be required to disclose the authority, the attorney may also be required to do so, for it is the privilege of the client and not the privilege of the attorney that the statute protects. *Avery v. Lee*, 244.

8. *Action by infant in forma pauperis — when surrogate should not pass on attorney's right to compensation — jurisdiction of Federal court; fix attorney's compensation.* The appellant acted as an attorney for an infant in an action brought to recover damages for injuries received. The action was originally brought in the State court but was transferred to the Federal court, and in both courts the action was brought *in forma pauperis*. The guardian *ad litem* for the infant appointed by the State court entered into a contract with the attorney by which the latter was to receive fifty per cent of the recovery. The attorney was subsequently appointed general guardian of the infant and prior to receiving the recovery in the action obtained an *ex parte* order of the surrogate allowing him fifty per cent of any recovery, with costs and disbursements. Having received the recovery, he petitioned for a judicial accounting as general guardian, in which proceeding the infant was not served with citation, but service thereof was admitted by the infant's mother and the special guardian. In that proceeding the surrogate made a decree assuming to settle the guardian's accounts and allowing a payment to himself of the share of the recovery set by the contract with expenses, and another general guardian was appointed for the infant. Subsequently the appellant petitioned for a supplementary accounting on which the infant was not cited and in this proceeding the special guardian objected to the prior allowance of the sum received by the appellant. The surrogate decided that the former decree was invalid and declined to pass upon the attorney's claim.

Held, that as the action was brought *in forma pauperis* the attorney was bound to prosecute without compensation, and that the contract for a contingent fee was unenforceable;

That the former decree purporting to settle the guardian's account and allowing the item of compensation was wholly without jurisdiction for failure to serve citation upon the infant;

That upon the second accounting the former adjudication as to the allowance of compensation was not binding upon the surrogate and that it was proper for him to remit the petitioner to the proper tribunal for the adjustment of his rights;

That under the Federal statutes there is no provision that the attorney for a plaintiff suing *in forma pauperis* shall receive no compensation, and in case of a recovery it is the practice of that court to allow the attorney a *quantum meruit*;

That although the Appellate Division under sections 2586 and 2587 of the Code of Civil Procedure has the same power as the surrogate to decide questions

ATTORNEY AND CLIENT — *Continued.*

of fact and to receive further testimony and to reverse or modify the surrogate's decree, nevertheless as the court did not have before it the order of the Federal court fixing the amount of the attorney's compensation, the matter should be remitted to the surrogate before whom the determination of the Federal court should be presented. *Mutter of Tyndall*, 294.

When counsel fees proper on reference to assess damage upon denial of an injunction *pendente lite*.

See INJUNCTION, 2.

Improper joinder of actions to recover value of legal services against several defendants.

See PLEADING, 1.

When action against attorney to recover money deposited should be for money received, not for a conversion.

See PLEADING, 6.

Summary proceedings to compel attorney to pay over.

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Counsel fees paid by executor to collect from coexecutor chargeable to estate.

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BALLOTS.

See ELECTION LAW, 1, 2.

BANKING.

When bank entitled to recover costs of foreign exchange. The defendant employed the plaintiff to transmit a sum of money in Peruvian currency to Peru by cable, which was done by the plaintiff acting through London bankers, who were paid a premium therefor. The defendant admitted the transaction and that certain expenses were paid by the plaintiff for commissions and disbursements as alleged in the complaint, but as a defense alleged that the moneys were not expended at the request of the defendant, or for its benefit.

Held, that the plaintiff was entitled to a direction of verdict, no defense being stated, in the absence of an allegation that the disbursement was not a necessary and proper one for the purpose of remitting the money to Peru, or of bad faith upon the part of the plaintiff;

That the allegation that the payment was not made at the request of or for the benefit of the defendant was a mere conclusion which did not present an issue. *National City Bank v. Pacific Co.*, 12.

When defense of usury not available against State bank.

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When foreign banking corporation employs taxable capital in this State.

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When deposit in trust for another is tentative — when widow of beneficiary not entitled to deposit.

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BANKRUPTCY.

1. *Partnership — when judgment on partnership debt discharged on bankruptcy of partner — cancellation of judgment.* A judgment on a partnership debt is properly scheduled on the voluntary bankruptcy of a member of the firm.

When on the voluntary bankruptcy of a partner he schedules a judgment against him obtained upon a partnership debt, the judgment creditor, having no other claim against the bankrupt, is presumed to have notice of the proceeding and that the insolvent would seek a discharge from the partnership debt, although it is not expressly scheduled as such.

When a firm is solvent and an individual member is insolvent and seeks a discharge in bankruptcy, he is entitled to a discharge and to have the business of the firm wound up and his surplus interest applied to liquidate his individual debts.

BANKRUPTCY — Continued.

The equity of an individual partner in the partnership assets passes to his trustee in bankruptcy, and although the firm debts are provable against him in bankruptcy, the firm creditors can only share in the individual estate after the individual creditors have been paid in full. *N. Y. Inst. for Instruction of Deaf & Dumb v. Crockett*, 269.

2. *Same — judgment.* Where a bankruptcy court has acquired jurisdiction and granted a complete discharge of a bankrupt partner without making any reservation as to partnership debts, the decision is *res adjudicata*. It seems, however, that if the discharge be expressly limited to individual debts, the bankrupt is not relieved from liability on firm obligations. *Id.*

3. *Same.* It is not a condition precedent to the discharge of the bankrupt that his estate shall have been completely administered and the accounts of the trustee finally settled.

In any event, on the discharge of an individual partner without reservation he is entitled to have a judgment on the partnership debt canceled of record when it does not appear that the firm is still doing business or has any remaining assets.

It seems, that in such circumstances if it appear that the bankruptcy court has been deceived and that the bankrupt has concealed his property or that a partnership with assets undistributed exists, the application for cancellation of judgment should be denied, for the purpose of enabling the judgment creditor to apply to the bankruptcy court to vacate the discharge. *Id.*

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Of counterclaim charging real estate agent with making a personal profit.

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BILLS AND NOTES.

1. *When action by holder not barred by prior action of third party on same note.* In an action upon a promissory note made by the defendant to his own order and indorsed and delivered to the plaintiff bank for value, it is no defense to allege that a third party, president of the bank, had brought suit to recover the amount of the consideration of the note, to which action the bank was not a party, even though the bank is alleged to have been the agent of its president and to have advanced the money paid as consideration for the note at the request of the president. *Empire Trust Co. v. Magee*, 34.

2. *Same — defense — when lack of consideration between maker and other party in collateral transaction not available against holder.* Under the same circumstances it is no defense to allege that there was a failure of consideration for the note between the maker and the president by reason of a failure to complete building plans in relation to which the consideration of the note was paid, of which fact the holder had knowledge.

When a complaint by a holder of the promissory note alleges that it was made and delivered to the holder for value, it is no defense to allege as a separate defense that there was a failure of consideration for the note between the maker and a third party, if the consideration between the maker and holder is not denied in such separate defense. *Id.*

3. *Same — pleading — failure to repeat allegations in separate defense.* Each separate defense must be construed as a whole, and the allegations of the complaint not denied in each separate defense are, for the purpose of the sufficiency of such defense, to be treated as admitted. Thus, the defense of the lack of consideration aforesaid is not good, if the holder's allegation that the note was delivered to it for value is not denied in the separate defense but only in a prior portion of the answer. *Id.*

4. *When question as to whether note was made for accommodation should not be submitted to jury.* When in an action upon a promissory note it is shown without dispute that the defendant, a manufacturing corporation, made a note for the accommodation of the payee, another corporation, and that the notes were renewed from time to time by the payee, which always paid the discount, the defendant is entitled to a ruling that the paper is an accommodation paper within the terms of the Negotiable Instruments Law, and it is error to submit that question to the jury.

BILLS AND NOTES — Continued.

When in an action against a manufacturing corporation, as maker of a note, it is established that the note was made for the accommodation of another, the holder's right to recover depends upon whether it was aware of the vice in the note. *Nat. Bank of Newport v. Snyder Manufacturing Co.*, 370.

5. *Same* — *manufacturing corporation cannot become accommodation party — burden of proof as to good faith of holder.* When an individual signs a note as an accommodation maker or indorser for the benefit of another he is liable to a subsequent holder for value although the holder knew him to be an accommodation party. But this rule does not hold in the case of a manufacturing corporation which has no power to bind itself as an accommodation party. Hence, in an action against a manufacturing corporation, which is conceded to be an accommodation maker, it is error to charge that the burden is upon the defendant to prove that the plaintiff knew or had reason to suspect that the note was an accommodation paper. Under such circumstances it is upon the holder to establish the *bona fides* of the transaction. *Id.*

6. *Defense of usury not available against State bank.* A State bank which has discounted promissory notes indorsed in blank by the payee may recover thereon against the maker, although the notes were usurious at their inception. The rule holds not only when such bank accepts the note from the maker, but holds equally where the bank takes the note by indorsement from the payee.

By section 55 of the Banking Law State banks are placed upon an equality with National banks as regards usury, and the only remedy against such bank where an illegal rate of interest has been taken is by a separate action to recover the penalty. The defense of usury cannot be set up as a counterclaim in an action on the note.

A bank which takes a usurious note by indorsement from the payee with knowledge of the usury ratifies the acts of its transferrer and is subject to an action for the penalty. *Schlesinger v. Lehmaier*, 428.

7. *Pleading — answer not stating defense.* When it is conceded that a promissory note made by the defendant was indorsed by the payee to a bank for value before maturity, and that the latter was holder in due course, it is no answer to allege that the transferee of the bank is not a *bona fide* owner and holder of the note, and that the note, after maturity and payment, was delivered by the bank for no value, and that the plaintiff is maintaining the action for the benefit of the original payee, and is not the real party in interest.

Such allegations are mere conclusions of law, and the answer does not comply with section 500 of the Code of Civil Procedure, which requires new matter constituting a defense or counterclaim to be stated in ordinary and concise language, without repetition. Allegations of conclusions of law do not fulfill this requirement.

The allegation that the note was transferred to the plaintiff "after maturity and payment" does not state facts showing payment.

Nor is the allegation that the transfer was without consideration a defense, for a holder may transfer negotiable paper without consideration, and the transferee stands in the shoes of the transferrer. *Ludlow v. Woodward*, 525.

Promise to pay a stated sum out of a particular fund not a negotiable instrument.

See CONTRACT, 13.

Judgment creditor's action to recover amount of corporate draft used to pay individual debt by president of corporation — when transferee holder in good faith for value — inquiry as to defects.

See DEBTOR AND CREDITOR, 1.

BLACKMAIL.

Conviction for sending threatening letters.

See CRIME, 2.

CALENDAR.

Waiver of preference by infant.

See PRACTICE, 13, 14.

Amendment conditioned on cause retaining place on the calendar — when notice of trial necessary.

See PRINCIPAL AND SURETY, 2.

CARRIER.

See RAILROAD, generally.

CASE ON APPEAL.

See APPEAL, generally.

CERTIORARI.

1. *Tax* — *certiorari to review assessment* — *when writ matter of right* — *allegations requiring grant of writ.* Certiorari under section 250 of the Tax Law is a matter of right if the facts stated in such section are set forth so as to vest the court with jurisdiction.

Allegations in a petition that the relator is aggrieved because an assessment of real property is fixed at a sum stated "which is erroneous, illegal and unjust by reason of overvaluation, the extent thereof being \$1,000,000, and your petitioner is aggrieved because the real property of your petitioner is assessed by the assessors aforesaid at an erroneous and excessive valuation," brings the case within the statute, vests the court with jurisdiction and requires the issue of the writ. *Matter of City of New York*, 811.

2. *Same* — *appeal.* When a petition for certiorari to review an assessment of aqueducts and gatehouses belonging to the city of New York raises the question of the illegality thereof, the question as to whether appurtenances thereto are also exempt will not be determined on an appeal from an order quashing the writ. *Id.*

Evidence insufficient to warrant dismissal of police officer.

See MUNICIPAL CORPORATION, 5, 6.

CIVIL SERVICE.

1. *Survival of action for damages under section 20.* An action against a commissioner of public works of a municipality brought under section 20 of the Civil Service Law to recover damages for the refusal of the defendant to allow the preference of a veteran guaranteed by the Constitution and the statute is an action for injury to property rights, survives the death of the plaintiff, and may be continued by his representative. *Burke v. Holtzmann*, 292.

2. *Same* — *failure to seek other employment excused.* When in such action it appears that the defendant some time in January promised to give the decedent work upon the city streets after the ice and snow had been removed, the decedent was excused from seeking other similar employment, and his failure to do so does not restrict the verdict to nominal damages, or prevent a recovery. *Id.*

CODE OF CIVIL PROCEDURE.

[For table containing all sections cited and construed in this volume, *see ante*, p. lix.]

CODE OF CRIMINAL PROCEDURE.

[For table containing all sections cited and construed in this volume, *see ante*, p. lx.]

CONFLICT OF LAWS.

When Federal decisions controlling as to service on foreign corporation.

See PROCESS, 2.

When existence of foreign corporation cannot be questioned here.

See WILL, 11.

CONSTITUTIONAL LAW.

Municipal corporations — *revocation of license to sell milk in the city of New York.* (Per GAYNOR, J., HIRSCHBERG, P. J., and HOOKER, J.): The board of health of the city of New York cannot, without notice and a hearing, revoke the license of a milk vender because he has been convicted in the criminal court of the offense of selling adulterated milk.

(Per GAYNOR, JENKS and WOODWARD, JJ.): Even when it is within the power of the Legislature to disqualify one from continuing in a particular business and to revoke a license, and when it may delegate such powers to a municipality, the latter can enforce no ordinance or regulation which it has not previously enacted, and when the selling of adulterated milk has been made punishable as a misdemeanor by municipal ordinance, an offender is subject only to the penalty prescribed and his license cannot be revoked.

CONSTITUTIONAL LAW — Continued.

(Per GAYNOR, J.): The "practice" or custom of the board of health to revoke licenses of such offenders is not an ordinance of the board or municipality.

A statute, general or local, for the taking away of a constitutional right by any process of a judicial nature is void unless it require a notice and hearing.

The Legislature itself is without power to prohibit the following of ordinary occupations. At the most it may only *regulate* such occupations under the police power.

The Legislature can no more confer power on the judicial than on the executive department to arbitrarily refuse or revoke a license to carry on any of the ordinary occupations of life.

Occupations which are inherently dangerous or annoying to the community, or pertain to the public service, or which are in the nature of privileges instead of rights, may be totally or partially prohibited under the police power. Other occupations, though they may not be prohibited, may yet be regulated for the general safety, welfare and comfort, which regulation may be effected by requiring permits or licenses. But the power of the board of health to require licenses neither implies nor carries with it the power to revoke such licenses at will unless the power be conferred by express words or necessary implication.

(Per JENES and WOODWARD, JJ.): The board of health of the city of New York has power to enact an ordinance of general application to the effect that a license to sell milk shall be revoked if the holder be convicted in the courts of selling adulterated milk, nor need such ordinance provide that notice be given after the conviction and before revocation. *People ex rel. Lodes v. Department of Health*, 856.

What constitutes a territory of the United States — extradition to Porto Rico.
See EXTRADITION.

[For tables of the sections of the United States and New York Constitutions cited and construed in this volume, see *ante*, pp. lv, lvi.]

CONTRACT.

1. *Statute of Frauds — when contract evidenced by correspondence.* Parties, by an interchange of correspondence and telegrams, may make a valid contract enforceable by either, and its validity is not necessarily affected because of a stipulation to reduce the contract to a more formal agreement.

The test is whether or not the proposition by one party and its acceptance by the other shows that their minds have met as to the terms of a contract leaving no essential term to future agreement. *Peirce v. Cornell*, 66.

2. *Sum — evidence — measure of damage.* The plaintiff was under contract to erect a building, and invited proposals for the ironwork. The defendant's agent examined the plans and specifications, and after some negotiations wrote to the plaintiff that it would furnish the ironwork for a sum stated, the steel to be purchased from parties named by the plaintiff, and that the defendant would furnish a bond, etc.

The plaintiff acknowledged the letter in writing, stating: "I accept the offer contained therein to erect the iron and steel work, and will submit a contract for you to sign in due season."

Held, that the correspondence constituted a valid and enforceable contract in which no essential element was lacking;

That upon a breach of said contract by the defendant in refusing to furnish the ironwork, except at an advanced price, the plaintiff was entitled to show on the question of damage the actual cost of doing the work for which the defendant had contracted;

That although the defendant, with plaintiff's consent, had offered a new proposition at an advanced price, the same being made with the understanding that it should in no way affect plaintiff's claim for damages under the original agreement, he was under no obligation to accept it. *Id.*

3. *Master and servant — contract of employment not to be performed in one year — Statute of Frauds — when servant may recover on executed contract although not in writing.* It seems, that although a contract for services not to be performed within one year is not in writing, the employee may recover on such contract so far as it has been executed.

But when at trial the plaintiff amends his complaint, which was originally on contract, so as to base his actions solely upon *quantum meruit* for services

CONTRACT — Continued.

rendered, he cannot recover upon the contract fixing the value of services. *Schrader v. Fraeuckel*, 97.

4. *When plaintiff suing on quantum meruit not entitled to recover percentage of profits.* Although the contract as proved in such action might have entitled the plaintiff to a certain percentage of the net profits, yet when it is found as a fact that the moneys actually paid the plaintiff were full compensation for his services, there can be no recovery of a percentage of the net profits in an action for a quantum meruit.

Where it appears that the net profits of the business on which the plaintiff was to receive a percentage for his services were to be figured by charging the plaintiff's salary as an expense, according to a recognized custom of the business, and the plaintiff accepted payments on that basis, that method of figuring the net profits must prevail. *Id.*

5. *Action on alleged promise of officer of corporation to pay debt of corporation.* The plaintiff had a contract to install a heating plant and a realty company had accepted an order from the owner to make payments to the plaintiff when due. When the work was partly completed, the plaintiff was warned that both the owner and the realty company were insolvent, and thereafter sued the treasurer of the realty company upon an alleged personal promise to pay for the work already done in consideration of the plaintiff's installing a boiler on the premises. Evidence considered and

Held, that a verdict for the plaintiff was against the weight of evidence. *Tullis v. Stone*, 227.

6. *Municipal paving contract — waiver of liquidated damages for delay.* When a municipal street paving contract providing for liquidated damages for delay by the contractor in completing the work within the specified time also requires the municipality to furnish the curbing, the liquidated damages are not recoverable when it appears that the curbing was not furnished so as to enable the contractor to perform within the time set. Such failure of the municipality to furnish the curbing as required is a waiver of its right to liquidated damages.

Although under the contract it may be incumbent upon such contractor to submit a claim for delay arising by reason of any act or omission of the municipality in order to diminish his liability for liquidated damages, such rule does not obtain when the damages are waived by the defendant.

When the original contract contemplated the paving of the street as it then existed, and thereafter the municipality proceeds to condemn land to widen the street, the provisions as to the time of performance by the contractor and for liquidated damages do not apply, for the increase of work caused by the widening of the street was not originally contemplated.

A party seeking the strict enforcement of the penalty in a contract must show himself to be without fault. *Callanan Road Improvement Co. v. Village of Oneonta*, 332.

7. *Gambling contract — fictitious transactions in stock — when purchaser entitled to recover moneys advanced.* When customers of an alleged broker have paid money as margins and commission for the purchase of stock in the actual belief that they were buying the same, they are entitled to recover the moneys advanced if no stock was actually bought or sold by the broker and the whole transaction was merely a matter of bookkeeping. *Fuller v. Municipal Telegraph & Stock Co.*, 352.

8. *Same — evidence of agency — agent as joint tortfeasor with principal.* When it is a question as to whether the person with whom the orders for purchases and sales of stock were placed was the agent of the defendant operating a branch office in another locality, and it is shown that the moneys received from customers were deposited by the alleged agent to the credit of the defendant and that a portion of the commissions was paid to the agent "as his fee" for doing business, the agency is established and the defendant is liable.

But when it appears that the agent when ending his relations with the defendant transferred the accounts of certain customers without expense to other brokers giving them a receipt from the new brokers, and when it also appears that the agent settled accounts with certain customers, such transactions are not effective to vest the agent or his assignee with title to the customers' claims against the defendant. *Id.*

CONTRACT — Continued.

9. *Same — settlement of agent with customers — when assignee of claims as settled not entitled to recover.* So, too, when a customer has been transferred by the agent to another company with his assent and without expense and has received from that company all the benefits that he would have received had the stock been purchased when the order was first given, he has suffered no damage and the transaction constituted an adjustment with one of the wrongdoers and bars an action against the other.

But customers who were charged new commissions by the agent for transferring them to the new company and who have received no moneys from that company, have not received satisfaction for the wrong done by the defendant in obtaining and holding their moneys. *Id.*

10. *Counterclaim.* Although the defendant's books show that its agent was indebted to it in a large sum on account of fictitious purchases made through the agent, such indebtedness is not available to the defendant as a counterclaim.

Extra allowance affirmed. *Id.*

11. *To supervise construction of work for percentage of total cost — right to percentage on damages paid to contractor for delay.* One who has entered into a contract with a municipality to prepare plans and specifications for a municipal work and to supervise the construction for five per cent of the total cost thereof, and has been paid his full percentage on the contract price of the structure is not entitled to recover an additional percentage upon a recovery had by the contractor against the city for damages caused by a delay in the work whereby the contractor was obliged to pay an advanced price for materials.

Such damages were not part of the cost of the construction within the meaning of the plaintiff's contract for services and were recovered not upon the provisions of the contract but because of a breach thereof. *Boller v. City of New York*, 458.

12. *Facts raising the question as to whether sale was absolute or conditional.* When in an action for the breach of a contract to sell and deliver lumber the case is tried upon the original oral contract and the defendant gives evidence that in making the order slip, which was shown to the plaintiff at the time, the defendant's agent wrote thereon "if you can't fill order this way, don't ship it," a question of fact arises as to whether the fulfillment of the original contract was conditional upon the defendant's ability to fill the order or was absolute, and it is error to withhold that question from the jury and to direct an assessment of damages. *Epstein v. Shepard & Morse Lumber Co.*, 467.

13. *Past act not consideration for promise — pleading — failure to allege consideration or performance — promise to pay out of a particular fund not negotiable instrument.* Action upon a contract. The plaintiff for a first cause of action alleged in substance that in consideration of notification by the plaintiff that certain work was to be performed and in consideration of the plaintiff's recommendation that defendants were proper persons to perform the work, the defendants agreed to pay the plaintiff half of the profits arising from the work, and that thereafter the defendants at the request of the plaintiff delivered a writing by which they agreed to pay the plaintiff ninety days after date a stated sum to be considered as part of the profits, as per the verbal agreement. As a second cause of action the plaintiff alleged that the defendants for a valuable consideration executed and delivered to the plaintiff the paper before set forth, that the plaintiff was the sole owner thereof, and that no part had been paid.

On demurrer,

Held, that if the allegations of the first cause of action be construed to allege that the verbal promise was made after the information and recommendation of the plaintiff, it was for services previously rendered and the contract was unenforceable for lack of consideration;

That if the agreement were made after services rendered without employment or request of the defendants there could be no recovery, for a consideration must consist of a present or future act; a past act cannot serve as a consideration for a promise;

That if the allegations be construed as an averment of an agreement to pay for information to be supplied thereafter by the plaintiff the complaint was insufficient in failing to allege performance;

That the paper set out in the complaint was not a negotiable instrument in that it was not an unconditional promise or order to pay a sum certain in money,

CONTRACT — Continued.

but was a promise to pay out of a particular fund, and in that it was not payable to order or bearer;

That the instrument not being negotiable or under seal the allegation that it was executed and delivered for a valuable consideration without setting out facts showing the consideration was a mere conclusion of law;

That the second cause of action was also defective in failing to allege that any profits had been earned by the defendant. *Fulton v. Varney*, 572.

14. *Statute of Frauds — when consideration expressed in written instrument cannot be varied by parol.* The rule that the consideration of an executory agreement is always open to explanation by parol evidence must be taken in connection with the equally familiar rule that a written contract complete in itself is deemed to have been intended by the parties to be the sole repository of their stipulations.

Although a written instrument may be attacked by parol evidence showing a want of consideration or a condition of delivery preventing it from taking effect, it is a different matter when it is sought to vary the written stipulations of an enforceable contract, and because a party may show lack of consideration it does not follow that he will be permitted to show that the consideration was less than that stated in the written contract.

Whenever a recital of a consideration in an instrument is merely evidence of a fact, it is subject to explanation, but when it is a substantive part of the contract embraced within the covenant it cannot be contradicted. *Sturmdorf v. Saunders*, 762.

15. *Same — guaranty.* Thus, where the defendant guaranteed in writing the collection of a chattel mortgage held by the plaintiff conditioned upon the payment of \$4,500, the defendant when sued upon his guaranty is not entitled to show by parol that at the time of giving the mortgage the sum stated was not owing to the plaintiff.

Cases collated and discussed. *Id.*

16. *Broker's agreement to release vendor from payment of commissions as consideration for vendee's promise to pay moneys.* When a vendor refuses to sell lands unless a real estate broker who was associated with the vendee in other transactions would waive any claim against the vendor for commissions, the vendee's promise to pay the broker \$100 if he waive his claim to commissions is founded upon a good consideration. *Cole v. Mendenhall*, 786.

17. *Pleading — promise founded on performance of existing obligations.* A complaint alleging in substance that simultaneously with the plaintiff's contract to serve as clerk of a corporation at a fixed salary, the defendant, who was president, stockholder and director thereof, promised to give him fifty shares of stock "in consideration of the faithful compliance by the plaintiff with the terms of the aforesaid contract between the said corporation and the plaintiff," which promise he failed to perform, does not state a cause of action as the defendant's contract was without consideration.

It seems, that had the plaintiff alleged that his contract for services with the corporation had been the consideration for the defendant's promise or that the plaintiff had been induced to make his contract with the corporation by the defendant's promise, a consideration would have been stated.

When a complaint sets out the consideration for an alleged contract it excludes proof of other or further consideration. *Petzs v. Leary*, 829.

18. *For services — no consideration for additional compensation.* Under a written contract of employment for three years by which plaintiff was to act as a journalist "in whatever position he may be assigned from time to time," at a salary "not less than" certain stated sums in each successive year, an oral promise by the employer to pay a bonus at the end of the term, if the plaintiff will fulfill his contract, is void for lack of consideration. *Price v. Press Publishing Co.*, 854.

19. *Same — Statute of Frauds — evidence.* Moreover, when the oral contract to pay said bonus was made more than one year before the expiration of the plaintiff's term, it is void under the Statute of Frauds as not to be performed within one year from the making thereof.

The Statute of Frauds creates a rule of evidence, and a void oral contract cannot be proved. *Id.*

CONTRACT — Continued.

Sale — mutual mistake — when corrected.
Green v. Smith, 920.

Agreement of creditors to prosecute claims for mutual benefit — one purchasing debtor's property holds as trustee for others.
See DEBTOR AND CREDITOR, 2.

When ante-nuptial agreement not made in lieu of dower.
See HUSBAND AND WIFE, 1.

Covenant for perpetual renewal of lease.
See LANDLORD AND TENANT, 8.

Proposals for contract for pumping engines — sufficient compliance with requirement that bidder give evidence of ability to perform — taxpayers' action restraining acceptance of bid.
See MUNICIPAL CORPORATION, 7, 8.

Improper joinder of actions to recover value of legal services against several defendants.
See PLEADING, 1.

Allegations of performance of conditions precedent under section 533 of the Code of Civil Procedure in complaint against surety.
See PLEADING, 13.

Causes of action for breach of contract and for damages caused thereby should be separately stated.
See PLEADING, 17.

Action for damages for breach of contract and for fraud in inducing the same are inconsistent.
See PLEADING, 18.

Evidence showing good faith of municipality settling action for which private contractor must indemnify the city.
See PRINCIPAL AND SURETY, 1.

Measure of damages for breach of contract to ship goods.
See SALE, 1.

When parol evidence inadmissible to show that absolute bill of sale was intended to create trust.
See SALE, 2.

Correspondence not constituting contract of sale.
See VENDOR AND PURCHASER, 8.

For the sale of real property.
See VENDOR AND PURCHASER, generally.

Actions upon insurance policies.
See INSURANCE, generally.
See COVENANT, generally.

CONVERSION.

When action against attorney to recover money deposited should be for money received, not for a conversion.
See PLEADING, 6.

Right of defendant to have actions for conversion and for goods sold separately numbered.
See PLEADING, 14.

CORPORATION.

1. *Inspection of corporate books — director's right to inspection.* Even though a stockholder's right to inspect the corporate books may be denied in the discretion of the court, the right of a director to such inspection is absolute, being necessary to enable him to perform the duties of his office. To enable a director to secure such inspection he need only show that he is a director and has demanded permission to examine the books and has been refused.

It is no answer to say that such director is, pursuant to the by-laws, the representative of a certain stockholder who is inimical to the corporation. If the

CORPORATION — *Continued.*

director's hostility is such as to justify his removal from office, this should be accomplished by the proper method. *People ex rel. Leach v. Central Fish Co.*, 77.

2. *Party — when liquidating committee of corporation may defend.* The liquidating committee of a corporation authorized to take all legal proceedings necessary to carry the liquidation into effect are officers of the corporation within the meaning of subdivision 1 of section 525 of the Code of Civil Procedure and may defend an action. *Wills v. Rowland & Co.*, 122.

3. *Action to compel reorganization committee to account — pleading — when complaint states cause of action — allegations showing fraud.* The plaintiff, as a stockholder, held the members of the reorganization committee of his corporation. The complaint set forth the plan for the reorganization of the company, by which the stockholders, creditors and bondholders of the corporation who joined in the plan were to deposit their stock and bonds with a depository, and a reorganization committee was appointed to act as agents and trustees for carrying out the plan of reorganization by forming a new corporation, taking in other companies, to which the property was to be transferred.

The complaint, among other things, alleged that the members of the committee had speculated for their own benefit with the securities deposited, and had issued false statements to the depositors; that they were guilty of negligence and misfeasance; had wasted and misapplied the assets of the property acquired by them, and had depreciated the value of the stock deposited, etc.; had caused the insolvency of the corporation and had refused to inform the stockholder of the amount of obligations and expenses incurred by them under the reorganization agreement, etc.

On demurrer to the complaint as not stating a cause of action.

Held, that a fiduciary relation existed between the depositors and the members of the reorganization committee, and that, without deciding whether the depositors might obtain an accounting at any time without showing a breach of trust, the allegations of the complaint sufficiently alleged bad faith by the committee and stated a cause of action for an accounting;

That a decision sustaining the complaint did not necessarily require that the reorganization plan be stayed or abandoned. *MacKinney v. Bliss*, 255.

4. *Mandamus by stockholder to obtain inspection of books — when writ refused.* A stockholder is entitled to mandamus to obtain an examination of the corporate books only when necessary in aid of his stock interests. But where the information is sought, not for the benefit of the stock interest, but to secure information in aid of a suit by a stockholder against directors personally for deceit and to recover damages sustained by reason of a false report published by them whereby he was induced to become a stockholder, the writ will be refused. *Matter of Taylor*, 348.

Manufacturing corporation cannot become an accommodation party.

See **BILLS AND NOTES**, 4, 5.

Action on oral promise of officer of corporation to pay debt of corporation.

See **CONTRACT**, 5.

Jurisdiction over foreign corporation by appearance.

See **COURT**, 1.

Judgment creditor's action to recover amount of corporate draft used to pay individual debt by president of corporation — when transferee holder in good faith for value.

See **DEBTOR AND CREDITOR**, 1.

Transfer of property by insolvent corporation to pay notes of transferee of which corporation had received the benefit.

See **FRAUD**.

When policyholder cannot recover dividend illegally declared — when company cannot recover former dividends paid.

See **INSURANCE**, 8-10.

When municipal franchise may be sold — ratification by municipality.

See **MUNICIPAL CORPORATION**, 1-4.

CORPORATION — *Continued.*

When jurisdiction of foreign corporation not obtained by service of summons on president.

See PROCESS, 1.

When foreign banking corporation employs taxable capital in this State.

See TAX, 1.

Gift to foreign corporation not *in esse*—suspension of power of alienation during period necessary to form a corporation to take a gift—when existence of foreign corporation cannot be questioned here—when corporation entitled to increase in funds.

See WILL, 9-13.

See INSURANCE, generally.

COSTS.

1. *Non-resident plaintiff*—when right to security for costs absolute. It seems, that when it is conceded that the plaintiff is a non-resident and has no property within the State, the defendant's right to security for costs is absolute under section 3268 of the Code of Civil Procedure.

In any event the court, in the exercise of its discretion under section 3271 of the Code of Civil Procedure, should order security for costs under such circumstances. *McKeaggan v. Post & McCord*, 129.

2. *When security required of foreign administrator.* When it is established without dispute that the plaintiff in an action based on personal injuries resulting in death as well as all the next of kin of the deceased are residents of another State and that the decedent was unmarried and left no children or children of deceased children and that the only asset in this State is the cause of action against the defendant, the plaintiff should be required to give security for costs. *Meiney v. Post & McCord*, 563.

3. *Recovery of less than \$500 in Supreme Court, New York county.* The purpose of subdivision 5 of section 3228 of the Code of Civil Procedure, denying costs to a plaintiff bringing action in the Supreme Court in the counties of New York and Kings unless he recover \$500 or more, was designed to discourage the bringing of actions in the Supreme Court which might be tried in the City Court. Although the latter part of said subdivision provides that the fact that in any action the plaintiff is not entitled to costs thereunder shall not entitle the defendant to costs under the following section, it is not thereby intended to deprive the defendant of costs merely because the plaintiff is not entitled to costs by reason of his failure to recover \$500. *Patterson v. Woodbury Dermatological Institute*, 600.

4. *Same—offer of judgment—when defendant entitled to costs from time of offer.* Thus, when in an action in the Supreme Court in said counties the defendant has made an offer of judgment not accepted and the plaintiff at trial recovers less than the offer and less than \$500, the plaintiff is not entitled to tax costs accruing prior to the offer of judgment.

Moreover, since the plaintiff failed to accept the offer of judgment and failed to recover a judgment more favorable than the offer, he is not entitled to costs from the time of the offer, but is required to pay the costs to the defendant from that time. *Id.*

5. *When plaintiff on second verdict entitled to costs of both trials.* When judgment for the plaintiff is reversed and a new trial granted, with costs to abide the event, and the plaintiff succeeds upon the second trial, he is entitled to tax the costs of both trials. There is a distinction between cases where costs are allowed "to abide the event" or "to the appellant to abide the event."

But where the plaintiff, successful on second trial, amends his complaint after the cause is placed on the calendar, he is not entitled to tax a term fee prior to the amendment. *Mossesin v. Empire State Surety Co.*, 782.

Right to new trial on payment of costs compelled by execution.

See EJECTMENT.

Upon unsuccessful application for a commitment.

See INCOMPETENT PERSON.

When counsel fees proper on reference to assess damage upon denial of an injunction *pendente lite*.

See INJUNCTION, 2.

COSTS — Continued.

Right of intervening plaintiff to move to bring in a new defendant — protection of coplaintiff against costs.

See PARTY, 3, 4.

Amendment of answer to ask reformation of contract conditioned upon payment of costs to date.

See PLEADING, 9.

Requiring security for costs of non-resident plaintiff is discretionary with court after service of answer.

See PRACTICE, 10.

Effect of prior order permitting suit as poor person upon order requiring non-resident to give security for costs.

See PRACTICE, 11.

Against surety in suit to compel fulfillment of undertaking.

See PRINCIPAL AND SURETY, 2.

When costs not authorized upon recovery of amount defendant had tendered before trial.

See TRIAL, 4.

Extra allowance in action to foreclose vendee's lien.

See VENDOR AND PURCHASER, 5.

COUNTERCLAIM.

See PLEADING, generally.

COURT.

1. *Jurisdiction by appearance of foreign corporation.* When our courts have obtained jurisdiction of a foreign defendant by its appearance in an action, the decisions relating to the jurisdiction obtained over property in the hands of a foreign corporation by service of attachment upon its agent have no application. *Oishei v. Pennsylvania Railroad Co.*, 110.

2. *Continuation of Trial Term.* There is nothing in the Codes or Constitution which prevents the continuation of a Trial Term beyond the duration of the original time set, even though in the meantime another term of the court is appointed to be held. In fact the provisions of section 45 of the Code of Civil Procedure and section 482 of the Code of Criminal Procedure authorize the continuation of a term beyond the expiration of the time appointed. *People ex rel. Weick v. Warden of City Prison*, 154.

3. *Same — criminal jurisdiction not lost thereby.* Hence, a court whose term is continued into the period when another term is held does not lose jurisdiction to try one indicted for a crime.

The person indicted for crime has no constitutional right to be tried in one court room rather than in another in the same county, and hence an objection to jurisdiction on such ground is without merit.

A judgment of conviction will not be set aside upon mere technical objections, if the rights of the accused have been fully protected, and the errors do not affect a substantial right. *Id.*

4. *Same — when habeas corpus not proper remedy.* In any event, habeas corpus is not a proper remedy by which to contest the jurisdiction of the court upon the ground that its term was unlawfully continued. If the judgment be irregular, the proper proceeding is by a motion for arrest of judgment or by an appeal. *Id.*

5. *Executors and administrators — jurisdiction of surrogate and Supreme Court.* The Supreme Court and the Surrogate's Court have concurrent jurisdiction to require the personal representatives of deceased executors and trustees to account for property which came into their hands. Ordinarily the Supreme Court will refuse to exercise its jurisdiction unless the jurisdiction of the Surrogate's Court be insufficient to determine all the questions involved. *Matter of Fogarty*, 588.

6. *Same — accounting by representative of deceased trustee — issues involving title to real estate.* The Surrogate's Court having a limited jurisdiction and being without power to try title to real estate, should refuse to require the representa-

COURT — *Continued.*

tive of a deceased trustee to account when a question involving the title to real estate must be decided as a prerequisite to the accounting. *Id.*

Appeal from order of justice of Special Sessions sitting in Children's Court.
See APPEAL, 5.

Jurisdiction to determine attorney's lien against foreign defendant — concurrent jurisdiction after removal of cause to United States Circuit Court.
See ATTORNEY AND CLIENT, 3, 6.

Decree settling accounts of guardian void for failure to serve citation upon infant — jurisdiction of Federal court to fix attorney's compensation in action *in forma pauperis*.
See ATTORNEY AND CLIENT, 8.

Judicial notice of Federal statute and jurisdiction of the Supreme Court of the District of Columbia.
See EVIDENCE, 7-9.

Code of Civil Procedure, section 549, subdivision 4, denying recovery on contract unless fraud is proved, if alleged, inapplicable to Justice's Court.
See PLEADING, 12.

Defense of lack of jurisdiction dependent upon facts must be taken by answer.
See PLEADING, 15.

Power of Appellate Division to perfect appeal.
See PRACTICE, 9.

Requiring security for costs of non-resident plaintiff is discretionary with court after service of answer.
See PRACTICE, 10.

When jurisdiction of foreign corporation not obtained by service of summons on president — special appearance to contest jurisdiction.
See PROCESS, 1-3.

When court will remove trustee appointed by will.
See TRUST, 4.
See SURROGATE, generally.

COVENANT.

Liability of tenant on surrendering building in bad condition under covenant to repair.

See LANDLORD AND TENANT, 1, 2.

For perpetual renewal of yearly lease.
See LANDLORD AND TENANT, 3.

Lis pendens not permissible in action on personal covenant by grantees.
See REAL PROPERTY, 1.

CRIME.

1. *Murder in the second degree — conviction sustained.* Evidence in a prosecution resulting in a conviction of murder in the second degree considered and judgment affirmed. *People v. Yoseow*, 75.

2. *Black-mail — judgment of conviction affirmed.* In a prosecution for sending threatening letters in violation of section 554 of the Penal Code, it appeared that the complaining witness had received two letters from a society called the "Black Hand," demanding payment of \$500, in default of which he and his family would be destroyed. The complaining witness testified that the defendant had called on him and demanded the payment of the money in compliance with the letters. On the whole evidence,

Held, that a judgment of conviction should be affirmed. *People v. Triscoli*, 120.

3. *Grand larceny in the second degree — conviction of one aiding in larceny sustained.* The defendant was indicted with another for the crime of grand larceny. On the trial it appeared that the defendant did no physical act in consummation of the larceny, which consisted in opening a woman's purse and taking money therefrom while she was standing in a crowd. The evidence showed that the defendant and his companion had been conferring together and acting in

CRIME—Continued.

a suspicious manner and that the defendant closely followed his companion when the latter opened the pocket book. On the whole evidence,

Held, that judgment of conviction should be affirmed. *People v. Klein*, 196.

4. *Grand larceny in the second degree.* The defendant was convicted of grand larceny in the second degree for failing to pay for or return upon demand a diamond ring which he had purchased on conditional sale. The defense was that the diamond was not of the weight represented by the complainant, but in this respect the defendant was contradicted by the contract of conditional sale. It was shown that he had paid the first installment by a check which was uncollectible, and had refused to return the ring upon demand. On all the evidence,

Held, that the judgment of conviction was right and should be affirmed:

That as the defendant did not make the payment at the time the ring was delivered, nor return the same when demanded, he was guilty of larceny under section 528 of the Penal Code. *People v. Gluck*, 432.

5. *Same—evidence—character of defendant impeached by questions as to specific acts.* When a defendant in a criminal action has offered himself as a witness, the prosecution on cross-examination may prove specific acts, tending to discredit him or impeach his moral character. Thus, he may be asked if he had not been engaged in selling worthless steamship tickets to poor immigrants. There is a distinction between evidence of previous arrest, indictment or accusation of wrongful acts, and evidence of the commission of the wrongful acts themselves. It is only evidence of the former character that the authorities condemn, and it is well settled that acts showing disregard of law and contempt of the rights of others may be shown on cross-examination to affect the credibility of the witness and impeach his moral character. *Id.*

6. *Grand larceny, first degree.* The defendant was indicted and convicted of grand larceny, first degree, in obtaining money by falsely representing that a certain bond upon which he obtained a loan was a subsisting and outstanding lien. Evidence considered and conviction sustained. *People v. Comky*, 462.

7. *Evidence—false representations as a part of res gesta.* When, in addition to the misrepresentation as to the validity of the bond, the defendant also made false statements as to the existence of a trust company of which he claimed to be attorney and that the person who wished to borrow money on the bond was a wealthy man, when in fact he was a notorious criminal, such minor false representations, connected with the principal misrepresentation, are part of the *res gesta* and evidence thereof is admissible. *Id.*

8. *Same—prior arrest and extradition of defendant.* Admission of evidence that the defendant was known by different names in various parts of the world and was under arrest at various times and was under requisition for extradition to another State is not error when shown to excuse the delay in bringing the defendant to trial. Said evidence is also admissible to identify the defendant and also to show flight from the scene of his crime in this State. *Id.*

9. *Same—parol proof of contents of check.* When the fact is admitted that the defendant received a check for twenty-five dollars for alleged services as an attorney in the transaction, the contents of the check may be shown without producing the instrument when the defendant is not indicted for receiving money on that check. *Id.*

10. *Same.* When the defendant under indictment is traveling under many aliases, a witness may state from what source he received his information as to the whereabouts of the defendant, even though the person who gave the information be not produced as a witness. *Id.*

11. *Practicing medicine defined.* Practicing medicine within the meaning of section 153 of the Public Health Law, prohibiting such practice without lawful registration, does not consist in merely administering drugs or the use of surgical instruments, but the term includes broadly the making of diagnosis and other recognized practice of physicians. *People v. Allcutt*, 546.

12. *Practicing medicine without right.* Hence, one not licensed to practice, who advertises himself as a doctor practicing mechano neural therapy, who takes patients, makes diagnosis and prescribes diet and conduct, and who asserts the power to "cure all diseases that any physician can cure without drugs, and also diseases that they cannot cure with drugs," and takes payment for consultations

CRIME — Continued.

and treatment, is properly convicted of a violation of the statute, although he administers no medicines. *Id.*

13. *Extortion by president of labor union — evidence.* The defendant, the president of a labor union, was convicted under sections 552, 553, and 554 of the Penal Code for extorting money from a contractor under the threat of continuing a strike after all controversies with the labor union had been settled. Evidence considered and judgment of conviction affirmed.

A threat by the president of a labor union, who has control of the action of the members, to continue a strike after all legitimate differences have been settled unless the contractor gives a certain sum of money to the defendant is a threat to do unlawful injury to property within the meaning of the statute. *People v. Weinseimer*, 608.

14. *Same — damage to complaining witness.* Although there is no evidence of the specific amount of damage which would have been sustained if the complaining witness had refused to comply with the threat, the conviction may be sustained if it appear that he would have sustained damage, and the failure to show the amount thereof does not require a reversal.

Neither is it material whether the contract of the complaining witness with the owner was what it purported to be or whether the owners were themselves to furnish the material and the complainant was merely paid for superintending the work, as upon either theory he would have sustained damage.

Neither is it material whether the money which the complaining witness delivered to the defendant was his own or the money of the owners for whom he acted as agent. In such action it is not a question as to whose money was extorted by the defendant, but whether he received it from the complainant. *Id.*

15. *Same — evidence of prior threat.* Evidence that prior to the offense charged the defendant threatened to call a strike on the same building when the work was in the hands of another contractor unless money were paid to him is admissible to show intent to do unlawful injury to the complainant's property and to show a previously conceived plan to commit the crime. Such evidence shows that the purpose and plan were directed toward "the contract work," the threat to the former contractor being so closely connected in time and similarity of circumstances as to indicate that the demands and threat constituted a step in a preconceived plan and purpose which culminated in the crime.

It is not error to refuse to charge that the jury cannot consider the statement of the former contractor that the defendant asked him for money as corroborative of the testimony of the complaining witness, when no request is made that the jury should be instructed that the evidence should be limited to the question of motive and intent, especially so when the court subsequently charges that there is no direct testimony corroborating the statement of the complaining witness that he was asked for money at the date of the extortion. *Id.*

Jurisdiction not lost by continuation of Trial Term beyond the original time set — technical objections.

See COURT, 2-4.

Conviction for murder in the second degree sustained.

See EVIDENCE, 2, 3.

DAMAGES.

Survival of action for damages for failure to give preference under Civil Service Law — failure to seek other employment excused.

See CIVIL SERVICE.

Measure of damages for failure to erect iron work in a building.

See CONTRACT, 2.

Waiver of liquidated damages by municipality.

See CONTRACT, 6.

Sufficient evidence thereof in trial for extortion.

See CRIME, 14.

To abutting owners by construction of underground railway — counsel fees and necessary expenses allowed.

See EMINENT DOMAIN, 1.

DAMAGES — *Continued.*

A finding that specific performance is impossible is a prerequisite to money damages.

See EQUITY.

When counsel fees proper on reference to assess damage upon denial of an injunction *pendente lite*.

See INJUNCTION, 2.

Defendant let in to defend excessive damages after default.

See JUDGMENT, 4.

In action on promissory note — answer alleging conversion of collateral must also allege damages.

See PRACTICE, 4.

Right to recovery on items for hospital expenses necessitated by injury not determined on motion to strike out allegations.

See PRACTICE, 5.

Measure of damages for breach of contract to ship goods.

See SALE, 1.

DEBTOR AND CREDITOR.

1. *Judgment creditor's action to recover sums paid to president of corporation — bills and notes — payment of individual debt by draft of corporation — when transferee holder in good faith for value — when holder not put upon inquiry as to defects.* The defendant trust company loaned to the president of a foreign corporation and another a sum of money, taking their personal note for the amount. The borrowers were owners of the entire capital stock of the foreign corporation and pledged the same with the trust company as security for the loan. Thereafter the borrowers applied for another loan with the alleged object of increasing the capital stock of the company, which loan was refused. The president of the foreign corporation negotiated with other parties for a loan on the credit of the company, and being successful and obtaining a draft payable to the order of his own corporation, paid his indebtedness to the defendant therewith and reclaimed the pledged stock. The draft with which the debt was paid was indorsed by him as the president and general manager of the company. The defendant trust company was informed at the time of the original loan that it was made to enable the borrowers to pay a balance due on stock of the corporation held by them. It also appeared that the borrowers were the sole stockholders of the corporation and that the president was vested by the board of directors with the entire control and management.

In an action to charge the defendant trust company with the value of the draft received by it on the ground that the money was used by the president to pay a personal debt,

Held, that the draft being commercial paper, and being taken by the trust company in discharge of a debt, the defendant was a holder for value whether the paper was taken before or after the debt was due;

That the plaintiff in order to recover must show that the paper was not taken by the defendant in good faith;

That owing to the facts that the president had full control of the corporation and any inquiry on the part of the defendant would have revealed the fact that he was empowered to do any act on behalf of the corporation and that the transaction between the borrowers and the defendant might have been an act done on behalf of the corporation, the defendant was entitled to treat the acts of the borrowers as those of the corporation and thus took the paper in good faith and for value;

That the defendant was not bound to inquire further into the details of the arrangement between the president and his corporation other than that it had given its consent to the use of the money. Facts which put a holder or indorsee of commercial paper upon inquiry as to a possible defect put him upon inquiry in respect to that particular defect only, and the duty of inquiry extends no further;

That although the capital stock of a corporation is a trust fund for the benefit of its creditors, who have an equitable lien thereon, both as against the stockholders and all transferees, except purchasers in good faith for value, yet

DEBTOR AND CREDITOR — Continued.

there is a difference between the vendee of the real or personal property of a corporation and one who takes its negotiable paper. In the latter case it is not a question as to the actual right of the transferrer to convey, but as to his apparent right to make the transfer. When there is such apparent right of transfer a holder for value in good faith will be protected unless he has notice of an abuse of trust or intended fraud;

That the fact that the borrowers, when taking the original loan paid commissions and other expenses and directed the division of the money into several checks for this purpose, and subsequently to the knowledge of the defendant borrowed large sums from other banks, did not charge the lender with any knowledge of a fraudulent purpose;

That although the payment to the defendant by the president made his corporation insolvent, the defendant, being a transferee for value, was protected in the absence of knowledge or information leading it to believe or suspect that the corporation would be thereby made insolvent. *Ward v. City Trust Co.*, 180.

2. *Agreement of creditors to prosecute claims for mutual benefit — when purchaser of debtor's property holds as trustee for other creditors — when release in former action does not bar creditor from sharing in trust property — reimbursement of trustee.* Several creditors entered into a mutual agreement to act together in the enforcement of their respective claims and that the amount realized should be shared *pro rata*. It was agreed that certain sums should be advanced by parties *pro rata* to protect the debtor's property from foreclosure on mortgages prior to their liens, and that upon foreclosure the property should be bought in and sold for the benefit of all creditors, none of them, however, being under obligation to advance any money.

Held, that one of the parties to said agreement who purchased the property on foreclosure held it impressed with a trust for the benefit of his fellow-creditors, although under the agreement he was under no obligation to buy the property;

That the interlocutory judgment in a former action by one of the creditors against the trustee to impress a trust upon the property bought on foreclosure was not *res adjudicata* as to the right of a creditor who did not appear in that action, when the relief awarded him in the final judgment was reversed on the ground that there was nothing to support it; that a receipt and release executed by such creditor in the former action relieving the other parties from all claims referred only to the claims and liabilities that might have arisen out of the transactions recited in said instrument and had no reference to the creditor's interest in the real estate impressed with the trust;

That as the purchaser on foreclosure was held to have purchased as trustee for his fellow-creditors, he was entitled to be reimbursed for the money actually paid for the property and not merely for so much thereof as went to satisfy the mortgage. *Eisert v. Bowen*, 488.

8. *Judgment creditor's action to set aside sale of personalty — right of insolvent incompetent to pay debts — pleading — failure to show transfer in fraud of creditors — when judgment creditor of incompetent may rescind sale induced by fraud — restitution in equity — failure to show sale in violation of chapter 569 of the Laws of 1904 — practice — only one judgment on demurrer authorized.* The complaint in a judgment creditor's action in substance alleged that one B., the judgment debtor, had a lease of a saloon with a right of renewal from year to year so long as he purchased beer from one D., who was owner of the building and fixtures; that D. required B. to assume a fictitious mortgage on the premises; that B. was mentally disordered by drink and incompetent intelligently to transact business or enter into contracts; that D. notified B. he must sell out and vacate, whereupon, while intoxicated, he sold his business and good will for \$1,950 to the defendants J. and M., which sale was consummated in the office of D.; that the actual value of the business sold was \$3,000; that the money received by B. was mostly expended in paying his debts, and that the transaction left him totally insolvent. These transactions were prior to the plaintiff's judgment against B. for goods sold.

Held, that the complaint failed to state a cause of action against the defendant D., as it was not alleged that D. had possession of any of the property transferred by B.;

That even though one be incompetent he may pay his debts and his incompetency is not ground for setting aside the transaction;

DEBTOR AND CREDITOR — Continued.

That as the alleged fictitious mortgage was not a lien upon anything owned by B. or transferred by him, the judgment creditor was not entitled to a cancellation thereof;

That as against the defendants J. and M., who purchased the business, the complaint stated no cause of action to set aside the transfer as fraudulent against creditors, there being no allegation of intent to hinder, delay or defraud creditors on the part of B.;

That although allegations of fraudulent intent are not absolutely necessary where facts showing intent are set forth, the facts alleged must reasonably lead to a conclusion of fraudulent intent which fairly excludes any other hypothesis;

That an insolvent may sell his property in good faith without fraudulent intent, although the sale places the property beyond the reach of creditors;

That the presumptions growing out of the Bankruptcy Act do not obtain in an ordinary judgment creditor's action;

Held, further, that the allegations that B., by reason of drink, was not in fit condition to transact business, and was unable to understand his acts or the effect thereof, was not a sufficient allegation of insanity to enable a judgment creditor to recover the property sold as standing in the shoes of the seller;

Nevertheless, it is *held* that treating the complaint as alleging fraud perpetrated upon the seller by procuring his intoxication, the judgment creditor must be considered as standing in the shoes of the seller and entitled to equal right to rescind the sale if fraudulent;

That the facts alleged showed that the seller was entitled in equity to rescind the transaction on the ground of fraud, and that this equitable right was a chose in action which a judgment creditor may reach by a suit in equity;

That although he who seeks equity must do equity, and in rescinding a sale return the amount paid to the vendee, and although in equity an actual tender before suit is not necessary, but the plaintiff must offer restoration in the complaint, the offer of restitution in the pleading is not a prerequisite to the institution of the suit but a condition for granting relief, and the complaint may be sustained where the plaintiff prays for general relief agreeable to the cause.

That although the complaint alleged that the merchandise was sold in bulk, not in the ordinary course of trade, without filing an inventory thereof five days before the sale, and without making inquiry as to the names and addresses of creditors, and without notification to creditors, a cause of action was not stated under chapter 569 of the Laws of 1904;

Held, further, that when several defendants demur only one decision is authorized, which should determine their several rights. *Pritz v. Jones*, 648.

4. *Judgment creditor's action to set aside conveyance — dismissal of the complaint sustained.* In an action by a judgment creditor to obtain a decree that the title to real property is held by a third person as trustee for the creditors of the debtor, it appears that the debtor entered into a contract for the purchase of the property, title to pass at a future day; in the meantime the purchaser to enter into possession and pay a rental. He entered into possession and his license for a saloon having been revoked by order of the court, he was unable to pay the consideration for the property in cash and purchase-money mortgage as required by the contract of sale, and the owner at the request of the debtor conveyed the premises to a third person, who paid therefor by purchase-money mortgages, etc. It further appeared that the saloon license was issued to the new purchaser and that the plaintiff's debtor had not paid more than \$250 toward the complete purchase price of \$7,250. It also appeared that the grantee had conveyed the premises to parties who had guaranteed the payment of the purchase-money mortgage given by him and who had advanced \$600 of the purchase price.

On all the evidence,

Held, that a dismissal of the complaint upon the merits was justified, as the plaintiff had not made out a case for equitable relief;

That the plaintiff was not entitled to have the conveyance set aside under section 74 of the Real Property Law providing that a grant of property to one person, the consideration to be paid by another, is presumed to be fraudulent as against the creditors of the person paying the consideration, for under the circumstances the evidence disproved fraudulent intent. *Colnon v. Buckley*, 742.

Payment is an affirmative defense and must be pleaded.

See EVIDENCE, 12.

DEBTOR AND CREDITOR — *Continued.*

Transfer of property by insolvent corporation to pay notes of transferee of which corporation had received the benefit.

See FRAUD.

Action to charge a joint debtor not personally served in a prior action.

See JUDGMENT, 1.

DEFINITION.

Meaning of the insurance term "Mark off."

Boutwell v. Globe & Rutgers Fire Insurance Co., 904.

"Practicing medicine" defined.

See CRIME, 11.

When the expression "*having* husband, etc., living" means *leaving* them surviving.

See WILL, 9.

DEPOSITION.

Commission upon interrogatories must state to whom issued. A commission to take the testimony of a witness upon interrogatories under section 887 of the Code of Civil Procedure must name the person to whom it is issued or it will be vacated. *Spurr & Sons (Incorporated) v. Empire State Surety Co., 816.*

Sufficient affidavit upon application to strike name from primary enrollment.

See ELECTION LAW, 5.

DISCOVERY.

1. *Examination of books and papers — defense of Statute of Frauds not considered on such application — inspection of papers in attorney's possession.* When in an action for the specific performance of a contract to sell lands, the plaintiff moves for an inspection of papers, a defense of the Statute of Frauds is no bar to the granting of the application if the complaint alleges the contract to convey and the consideration agreed upon. The complaint need not allege that the agreement was in writing, for the Statute of Frauds is an affirmative defense, and the merits of that defense will not be determined on a motion to inspect papers. *Avery v. Lee, 244.*

2. *Practice — inspection of books and papers before trial.* When in an action for services the defendant counterclaims fifty odd items of moneys misappropriated by the plaintiff at specific dates, which items are particularly set forth in the answer, the plaintiff should be allowed an inspection of the defendant's books in order that uncontested issues may be eliminated from the trial.

Under such circumstances an inspection is as much for the benefit of the trial court as for the party himself. *Edmonds v. Attucks Music Publishing Co., 486.*

Inspection of papers in attorney's possession — attorney acting as business agent not privileged.

See ATTORNEY AND CLIENT, 7.

Right of director to inspection of corporate books.

See CORPORATION, 1.

Mandamus by stockholder to obtain inspection of books.

See CORPORATION, 4.

DIVORCE.

Failure to show collusion — admission by defendant.

See HUSBAND AND WIFE, 2.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD.

See HUSBAND AND WIFE.

See PARENT AND CHILD.

DOWER.

When ante-nuptial agreement not made in lieu of dower.

See HUSBAND AND WIFE, 1.

EJECTMENT.

New trial on payment of costs—right where payment compelled by execution. Under section 1525 of the Code of Civil Procedure whereby the defendant in an action of ejectment is entitled to a new trial as a matter of right upon payment of costs within three years after entry of judgment against him, it is immaterial whether the costs be paid by the defendant voluntarily or collected from him by execution on the judgment. That section does not refer to a voluntary payment of costs only. Actual payment within the time specified is all that is necessary.

The situation is not affected by reason of the fact that the execution was satisfied by a sale of the interest of the defendant in the premises. *Townshend v. Keenan*, No. 1, 484.

ELECTION LAW.

1. *Preservation of ballots after time for destruction has expired.* Although section 111 of the Election Law provides for the destruction of ballots after the expiration of six months, yet when new ballot boxes have been acquired and a controversy is pending as to the legality of an election, an order requiring the preservation of the ballots after the expiration of the statutory time will not be vacated, when it does not appear there is any public necessity for the vacating of the order or that the use of the old ballot boxes will be necessary in coming elections.

In any event the application to be relieved from the order preserving the ballots should be made by the board of elections against whom it operates rather than by the officeholder whose election is contested. *Matter of Hearst*, 240.

2. *Use of unofficial ballot unauthorized—mandamus to inspectors to reconvene and certify result.* The Election Law prohibits the use of unofficial ballots except as provided in sections 89 and 107.

When it appears that at a village election an official ballot conforming to the statute was printed and used, the inspectors of election are without authority to issue, poll or count unofficial ballots, and if they have done so, mandamus will issue to compel them to reconvene, return the unofficial ballots, correct the statement of the results of the canvass and make a proper certificate of the result.

The writ will issue even though the officials elected on the unofficial ballot have been declared elected and are holding office. While under the writ the court cannot oust *de facto* officers and induct others in their places, the writ lies for the purpose aforesaid, and the persons who then appear to have received the legal majority may assert their rights to office in a proper proceeding. *People ex rel. March v. Beam*, 874.

3. *Application to strike name from primary enrollment—when public question involved.* The question of the sufficiency of an affidavit on an application under subdivision 11 of section 3 of the Primary Election Law to strike a name from the primary enrollment is of such public importance that the court will hear the case, although the primary election has been held. *Matter of Titus*, 621.

4. *Same—statutory construction.* Although it seems that the Legislature may prescribe such rules and regulations applying to all primary elections as it deems necessary and proper, and may provide for the removal of the name of an elector from the enrollment when he has removed from the district, yet when the Legislature has not made adequate provision to protect such elector from having his name stricken from the roll without his knowledge the said statute should be so construed as to afford him the necessary protection. *Id.*

5. *Same—when affidavit insufficient.* Said statute authorizes the removal of the name of an enrolled elector only upon proof constituting satisfactory evidence not only that the elector has removed from the address from which he registered, but from the election district as well. Hence, when such elector served by mail at his last known address has failed to appear in the proceeding to remove his name from the roll and the affidavit showing his removal from that residence given is not made by a lessee or occupant or janitor or proprietor of the premises, but by an occupant of a house in the vicinity, and the affiant has no personal knowledge that the elector has actually removed from the election district as well, but merely states that fact as a conclusion, the affidavit is insufficient, although uncontradicted, to make it a mandatory duty of the court to strike the name from the enrollment.

ELECTION LAW — Continued.

(Per SCOTT, J.): Such affidavit merely shows that the elector removed from the dwelling and raises no presumption that he removed from the district, and a mere statement that he no longer resided in the district is valueless as proof. *Id.*

ELECTION OF REMEDIES.

Right of defendant to compel election in action for conversion and for goods sold.

See PLEADING, 14.

EMINENT DOMAIN.

1. *Municipal corporation — injury to abutting owners by construction of underground railway — counsel fees and necessary expenses allowed.* The granting of the application of the rapid transit commissioners of the city of New York to legalize an unauthorized use of Park avenue for an underground railway is in the discretion of the court, and where the use of such street has caused actual damage to abutting owners, the court in its discretion will award the property owners a reasonable amount for the expenses in ascertaining the amount of damage to which the property has been subjected. The award should include compensation for counsel, taxable costs and other disbursements necessary for the proper presentation of the case to the court. A reasonable counsel fee is five per cent upon the amount of the award made to each owner, not exceeding \$1,000 in any case. *Matter of Board of Rapid Transit Railroad Comrs.*, 160.

2. *Taking land for improvement of Erie canal — failure to file map, certificate, etc.* Entry upon lands by a contractor for the purpose of improving the Erie canal under chapter 147 of the Laws of 1903 without the filing of the map, survey and certificate and without notice to the owner, is a trespass for which the State is not liable, but for which the contractor only is liable. *United Traction Co. v. Ferguson Contracting Co.*, 805.

3. *Same — when lessee of railroad may enjoin appropriation of street.* When such contractor intends to enter upon and appropriate a street upon which there is a surface railroad without the filing of the map and certificate and without notice, the railroad is entitled to an injunction restraining the contractor from entering, excavating or in any way interfering with its structures or rights. *Id.*

4. *Same — rights of lessee.* The plaintiff, although the lessee of the railroad, may maintain the action even though its rights be considered personal property, for a lessee may recover not only for injury to his leasehold but for injury to the remainder as well. *Id.*

5. *Condemnation of existing water works by municipality — when consent of State Water Commission not necessary.* Although section 2 of chapter 723 of the Laws of 1905 requires a municipal corporation before acquiring lands for "new or additional sources of water supply" to submit maps to the State Commission and procure its approval, the requirement applies only to proceedings to condemn lands for new or additional sources of water supply. The statute has no application where a municipality seeks to condemn a fully equipped and established system of water works which has theretofore furnished the local supply.

It seems, that one of the main objects of said statute is to protect municipalities and the inhabitants thereof from encroachment by other municipalities. *Village of Waverly v. Waverly Water Co.*, 336.

6. *Acquisition of piers by city of New York — compensation for "shedding license" taken.* When a pier owned partly by the city of New York and partly by private owners is taken by eminent domain and the private owners have a license from the city to erect and maintain a shed upon said pier, the "shedding" right is an incorporeal hereditament enhancing the value of the property and cannot be taken without due compensation. This is true, although the license to build the shed provides that the manner of construction is subject to regulation by the police power and reserves a right to require changes and additions.

Although the right to build a shed was originally given in 1873, which right, though unauthorized, was confirmed by chapter 249 of the Laws of 1875, the property right therein is not lost by reason of the fact that the shed has been partially destroyed by fire, and the owner of that right is entitled to compensation therefor when the pier is taken by eminent domain.

EMINENT DOMAIN — Continued.

But when a pier having no present shedding right appurtenant thereto is taken, the owner is not entitled to compensation for the possibility that such permit might be granted in the future. *Matter of City of New York (Piers Old Nos. 19 and 20)*, 553.

7. *Municipal corporations — taking lands for park purposes in city of New York — when interest on award barred.* Although section 4 of chapter 522 of the Laws of 1884 allows the owner of lands taken by the city of New York to recover by action the award "with lawful interest" after default in payment thereof, such interest is not a part of the award but is in the nature of damages for default in payment and can only be recovered in an action for an award.

Hence, when the award has been paid and the owner has given a receipt for full payment, no subsequent action lies to recover interest although the owner reserved the right to claims for interest on the award. *Grote v. City of New York*, 768.

EMPLOYERS' LIABILITY ACT.

See MASTER AND SERVANT, generally.

EQUITY.

Specific performance — money damages in lieu of performance — finding of inability of defendant to perform is prerequisite. A suitor's right to specific performance is founded on his right to equitable relief. If upon trial it appears that he is entitled to equitable relief, it will be decreed. If, however, it appears that in consequence of the condition of the title specific performance cannot be decreed, the action is then reserved for trial as an action for damages for a breach of contract, and will either be sent to a jury or tried and determined by the court as the circumstances require. But before the court can give a money judgment, it must decide that specific performance cannot be awarded. Hence, a decree which awards specific performance or money damages in the alternative without finding as a fact that specific performance is impossible is unauthorized. *Levy v. Knepper*, 163.

Offer of restoration in the complaint in a judgment creditor's action against a vendee of the debtor.

See DEBTOR AND CREDITOR, 3.

When trustee who has participated in illegal transfer of property may bring action to rescind the same.

See EXECUTOR AND ADMINISTRATOR.

When court will not order summary cancellation of a lease by receiver of rents and profits for a good consideration.

See MORTGAGE, 1-3.

Tender as a prerequisite to equitable relief.

See PLEADING, 4.

Vendee entitled to equitable lien on lands to the extent of consideration paid.

See VENDOR AND PURCHASER, 3-5.

Conversion of realty into personalty under the provisions of a will.

See WILL, 12.

See INJUNCTION.

ESCHEAT.

When title of State not divested by foreclosure.

See REAL PROPERTY, 2.

ESTOPPEL.

Of legatees who have accepted division of estate for five years from objecting to basis thereof.

See WILL, 14.

EVIDENCE.

1. *Defendant who has made plaintiff's agent his witness cannot introduce written evidence to contradict him.* When the defendant on cross-examination has made the plaintiff's agent his own witness by introducing in evidence a letter of the agent, the defendant's letter in answer thereto is incompetent. *National City Bank v. Pacific Co.*, 12.

EVIDENCE—Continued.

2. *Expert testimony as to sanity—various alleged errors considered.* When an expert's testimony as to what symptoms would be manifested by a person shamming unconsciousness is merely a repetition of what has already appeared in evidence, and proves nothing, its admission is not reversible error.

Lay witnesses who have had transactions with the defendant may testify as to whether his acts impressed them as being rational or irrational.

When an expert has testified that the defendant is sane, basing his opinion upon a physical examination, and has also pronounced him sane when interrogated on a hypothetical question, it is not error to take his opinion based both upon his examination and the hypothetical question without repeating the same. *People v. Koerner*, 40.

3. *Basis for opinion.* When there is no dispute that the deceased came to her death through the act of the defendant and one of the defenses is insanity, it is not error to allow experts, who have examined the defendant between the murder and the trial, to testify to the results of their examination. Under such circumstances the defendant's mental condition prior to the homicide and at the time of trial are proper subjects of consideration for the jury.

A defendant is not prejudiced by testimony as to his sanity subsequent to the homicide, which is stricken out.

When it is admitted that the deceased had broken her engagement with the defendant, it is not error to admit her letter to a third person stating that the engagement was broken. *Id.*

4. *Opinion as to permanency of injury not based on facts.* Medical experts should not be allowed to express an opinion as to the permanence of an injury when the opinion is not based on facts submitted to the jury, but is pure conjecture.

Such opinion cannot be based on the testimony of the plaintiff, as the opinion determines the effect of his evidence.

Nor can the opinion be based upon the facts that the witnesses dressed the plaintiff's head after the accident and found a fissure in or fracture of the skull, the extent of which they did not investigate, and that shortly before the trial they found a scar and slight depression.

When the verdict shows that the plaintiff was awarded damages for a permanent injury instead of for the loss of a few days' time it is evident that such expert testimony was prejudicial, and a judgment for the plaintiff should be reversed. *Leahy v. Gaylord & Bitapenc Co.*, 316.

5. *Erroneous admission of prior statements to corroborate witness.* Although a witness on cross-examination has been asked if he did not make a certain oral statement concerning an accident, having denied that he did, it is error to permit him on redirect examination to testify as to what statement he did make; and where the witness was an important one in establishing the plaintiff's case, and the statement testified to was in corroboration of his direct testimony, the error is ground for a reversal. *Zuckerman v. New York City Railway Co.*, 378.

6. *Transaction with decedent—indirect evidence of transaction incompetent.* Section 829 of the Code of Civil Procedure forbids not only direct testimony of personal transactions with a decedent, but also every attempt by indirection to prove the same thing.

Thus, when plaintiffs suing on a *quantum meruit* to recover for services in preparing plans for a house for the decedent are allowed overobjection to testify to frequent interviews with the decedent respecting the plans while they were being prepared, and to a number of consultations and interviews when the plans were discussed, it is reversible error. *Little v. Johnson*, 500.

7. *Defective record of judgment of foreign court corrected on appeal.* Although in an action upon a judgment of a foreign court, the record of the judgment was not authenticated in the manner required by the Code of Civil Procedure to be read in evidence, the defect may be remedied by the presentation of a duly authenticated record in the appellate court. *Milliken v. Dotson*, 527.

8. *Judicial notice—Federal statute organizing courts of District of Columbia.* The act of the Congress of the United States (12 U. S. Stat. at Large, 762, chap. 91) organizing the courts of the District of Columbia is a public act of which the

EVIDENCE—Continued.

courts of this State will take judicial notice, and the same may be read in evidence without the proof required in the case of laws of a foreign jurisdiction.

Such act passed under the authorization of subdivision 17 of section 8 of article 1 of the United States Constitution is the supreme law of the land. *Id.*

9. *Same—jurisdiction.* Although it is beyond question that our courts will take judicial notice of said act, when in an action upon a judgment of the Supreme Court of the District of Columbia the record is put in evidence, the jurisdiction of the court is presumed in the absence of proof to the contrary and the plaintiff is entitled to judgment. *Id.*

10. *Rules as to proof of survivorship when several parties perish in same disaster.* At common law there is no presumption of survivorship between persons who perish in a common disaster based upon a difference of sex, age or physical condition and strength, nor is there a presumption the death of all occurred at the same instant. Yet through necessity in the administration of the law the title to real and personal property passes as if they had all perished at the same instant of time in the absence of proof of facts or circumstances tending to show survivorship among them.

Therefore, when it appears that a testator, his wife and a legatee all perished in a fire which consumed a dwelling house, the burden is upon the administrator of the legatee in order to entitle him to receive the legacy to prove facts and circumstances tending to show that she survived the testator. But under such circumstances, there being no presumption of death at the same time, there is no burden upon the administrator to overcome any presumption, but merely to prove the fact of survivorship as any other fact is required to be proved. Neither is it necessary to show that the deceased survived the testator for any length of time; survival for a second is sufficient.

In order to establish the survivorship aforesaid it was, among other things, shown that the testator was last seen in an upper story of the building warning the occupants to fly, which portion of the building suffered greatly from the fire and where his body was afterwards found. The legatee, however, was removed still breathing from a part of the building where the destruction by fire was not great, and where life was sustainable for a longer period. She survived her removal from the building a few minutes. On all the evidence,

Held, that a finding that the legatee survived the testator was warranted by the evidence. *St. John v. Andrews Institute*, 698.

11. *Presumption of payment of mortgage after twenty years.* After a mortgage debt has been due twenty years, there is a conclusive presumption of payment in the absence of proof of part payment within that period, and such presumption may be invoked where the marketability of the title is in question. *Ouvrier v. Mahon*, 749.

12. *When evidence of payment inadmissible—checks not connected with transaction incompetent to show payment.* Payment is an affirmative defense and must be pleaded. Even if pleaded, payment cannot be established by putting in evidence the defendants' checks given prior to the transaction in controversy and unconnected therewith by any evidence, and a judgment based upon such erroneous evidence will be reversed. *Schackler v. Kukowsky*, 750.

13. *Reference—evidence of prior offense.* It is not error for such referee to exclude a question put to the respondent on cross-examination asking whether other clients were making claims against him for money collected and not reported. An offense is not proved by proof of another offense, and such proof is not relevant upon the legal doctrine of probabilities. This rule obtains both in civil and criminal cases and in cases involving the tortious withholding of property which may be made the basis of a criminal case.

The exception to the rule exists only when the repetition of the offense negates the plea of ignorance, or accident, or indicates that the act under investigation was one of a series involving a fraudulent design. *Matter of Jones & Co.*, 775.

Failure to object to testimony of transactions with deceased.

See APPEAL, 2.

When attorney not privileged from testifying.

See ATTORNEY AND CLIENT, 7.

EVIDENCE — Continued.

Burden of proof as to good faith of holder of promissory note.

See **BILLS AND NOTES**, 5.

When consideration expressed in written instrument cannot be varied by parol.

See **CONTRACT**, 14, 15.

Proof of contract excluded by virtue of Statute of Frauds.

See **CONTRACT**, 19.

Character of defendant impeached by questions as to prior specific acts.

See **CRIME**, 5.

False representations as part of *res gestæ* — when evidence of prior arrest and extradition is admissible — parol proof of contents of check.

See **CRIME**, 7-10.

Action for extortion — proof of prior threat to call a strike made to former contractor.

See **CRIME**, 15.

Erroneous exclusion of evidence showing knowledge of danger of incendiarism under a defense of breach of warranty.

See **INSURANCE**, 1.

Judgment on foreclosure admitted to show deficiency in action for money had and received — declarations against interest.

See **MORTGAGE**, 6, 7.

Expert testimony raising question of fact as to ability to stop train.

See **NEGLIGENCE**, 4.

Resolution of board of health is not evidence of a nuisance.

See **NUISANCE**, 7.

When adjournment should be granted to allow production of documentary evidence.

See **PRACTICE**, 20.

Representative capacity of defendant admitted by failure to deny.

See **PRACTICE**, 20.

Showing good faith of municipality settling action for which private contractor must indemnify the city — when prior statements of principal to city authorities inadmissible.

See **PRINCIPAL AND SURETY**, 1.

Presumption from possession of deed by grantee — proof of intention varying written instrument.

See **REAL PROPERTY**, 3-5.

When referee may exclude testimony.

See **REFERENCE**, 2.

When parol inadmissible to show that absolute bill of sale was intended to create trust.

See **SALE**, 2.

Declarations of agent to prove agency.

See **SALE**, 4.

When no presumption arises from possession of life insurance policy.

See **TAX**, 3.

Transactions of beneficiary with deceased depositor inadmissible.

See **TRUST**, 3.

Presumption of payment of mortgage after twenty years.

See **VENDOR AND PURCHASER**, 6.

EXAMINATION OF BOOKS AND PAPERS.

See **DISCOVERY**.

EXECUTION.

Application of receiver to sell debtor's interest in real property — prior judgment as bar.

See SUPPLEMENTARY PROCEEDINGS.

EXECUTOR AND ADMINISTRATOR.

Party — when trustee who has participated in illegal transfer of property may bring action to rescind the same. The plaintiff, individually and as executor, brought action against his coexecutors to set aside a conveyance of property of the estate. It was alleged that one of the defendant executors fraudulently induced the plaintiff and other executors to convey to an irresponsible party a brewery which was part of the estate; that said party paid no cash consideration, but gave a purchase-money mortgage on certain parts of the property, and immediately thereafter conveyed the brewery, without consideration, to a corporation, in order that the defendant executor might acquire ownership thereof by controlling the stock of the corporation, which was issued to him and other defendants and to the plaintiff, without consideration.

Held, that facts were alleged that showed that the executor had obtained the trust estate for his own use, was guilty of a breach of trust, and that a cause of action for equitable relief was stated;

That the objection that the complaint did not state a cause of action in favor of the plaintiff was not tenable because having discovered the illegality of the transaction, he was entitled that the conveyances be declared null and void or in the alternative that all the stock of the corporation issued should be declared to be the property of the executors in their trust capacity;

That, although the plaintiff had himself received part of the stock, as he disaffirmed the transaction, he need not join himself as a party defendant;

That the plaintiff, being trustee of an express trust, might sue as such, even though he participated in the acts complained of, which rule obtains whether the participation were innocent or not, especially as certain of the beneficiaries had requested that he bring action;

That the doctrine of *in pari delicto* does not apply to trustees suing in their representative capacity, it being their duty, if party to an illegal transfer of trust property, to repent and sue for the restitution of the fund. *Smith v. Stevenson Brewing Co.*, 690.

Accounting — allegations by executors sued for an accounting that the surviving trustee, to whom they must turn over certain funds, is incompetent are not irrelevant because they reflect upon the character of such trustee.

Hall v. Strong, 912.

Survival of action for damages for failure to give preference under Civil Service Law — failure to seek other employment excused.

See CIVIL SERVICE.

When security required of a foreign administrator bringing an action in this State.

See COSTS, 2.

Concurrent jurisdiction of surrogate and Supreme Court in accounting by representative of deceased trustee.

See COURT, 5.

Power of surviving partner to whom, as executrix, the will of deceased partner gives controlling interest in business.

See PARTNERSHIP, 1.

Representative capacity of defendant admitted by failure to deny.

See PRACTICE, 20.

Statute does not run on liability of executors and beneficiaries for inheritance tax.

See TAX, 5.

Counsel fees paid by executor to collect from coexecutor chargeable to estate.

See WILL, 5.

When will contains implied power to sell real estate.

See WILL, 8.

EXECUTOR AND ADMINISTRATOR — *Continued.*

Direction that executrix continue partnership business — proper division of income therefrom — when executrix should not be charged with payment of tax recoverable from government.

See WILL, 14.

See WILL, generally.

EXTORTION.

Conviction of president of labor union for extortion.

See CRIME, 18.

EXTRADITION.

Requisition from Governor of Porto Rico — what constitutes a "territory" of the United States. Extradition from the State of New York is governed by the Constitution and statutes of the United States, for upon that subject the individual States do not possess the power of independent nations.

Upon the ratification of the treaty of Paris by which Porto Rico was ceded to the United States that island ceased to be a foreign territory, and when Congress established a civil government with executive, legislative and judicial powers under the control and jurisdiction of the United States, Porto Rico became an organized territory of the United States.

Section 5278 of the United States Revised Statutes provides that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice * * * it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured * * * and to cause the fugitive to be delivered."

Hence, on the requisition of the Governor of Porto Rico for the extradition of a person charged with embezzlement in that island it is the duty of the Governor of New York to issue a warrant for his arrest as provided by section 827 of the Code of Criminal Procedure; and it is not necessary that the extradition be had through the Federal authorities under section 5270 of the United States Revised Statutes which governs extradition to foreign territory.

Irrespective of the territorial status of Porto Rico the requisition should be honored for in 1900 Congress provided (31 U. S. Stat. at Large, 81, § 17) that the Governor of Porto Rico should have "all the powers of governors of the territories of the United States that are not locally inapplicable," and this would include the power of requisition conferred on such Governors by section 5278 of the United States Revised Statutes. *People ex rel. Kopel v. Bingham*, 411.

FALSE IMPRISONMENT.

Liability of municipality for unauthorized arrest at instigation of street cleaning department.

See ASSAULT AND BATTERY.

FIRE INSURANCE.

See INSURANCE, 1.

FORECLOSURE.

See MORTGAGE.

FOREST, FISH AND GAME LAW.

1. *Section 27 of the Forest, Fish and Game Law construed* — sale of foreign grouse without giving bond prohibited. By the amendment to section 27 of the Forest, Fish and Game Law made by chapter 580 of the Laws of 1904, the selling of foreign grouse and woodcock is prohibited unless the persons selling them or offering them for sale have given the bond required by said section. Said section, as amended, does not merely make the possession or sale of grouse without giving a bond presumptive evidence that they were taken within the State, but absolutely prohibits the sale of foreign birds without giving a bond. *People v. Weinstock*, 168.

2. *Sale of foreign grouse — erroneous nonsuit.* In an action to recover the penalty for selling grouse or partridge without giving a bond as prescribed by section 27 of the Forest, Fish and Game Law, it is immaterial whether the birds were killed in this State or in a foreign State, if the defendant has not filed a bond.

When the defendants contend upon conflicting facts that they merely delivered the grouse as agents of foreign owners, the question whether they acted in that

FOREST, FISH AND GAME LAW—*Continued.*

capacity only or actually sold individually or as agents is for the jury, not for the court, and a nonsuit is error.

Although the defendants act as agent for a non-resident in making such sales, they are not relieved from liability. *People v. Stillman*, 170.

FRANCHISE.

When municipal franchise may be sold — ratification by municipality.

See MUNICIPAL CORPORATION, 1-4.

Unauthorized grant of right to build private railroad in city of New York.

See MUNICIPAL CORPORATION, 9.

FRAUD.

Transfer of property by insolvent corporation to pay notes on which the transferee was liable — sufficient consideration — statute against preference. The defendant's testator was liable on notes issued without his consent, of the proceeds of which a corporation of West Virginia had received the benefit. The testator was not an officer of the corporation, and brought action against it to compel it to meet the notes on which he was liable. The corporation, having no defense, transferred sufficient of its property to satisfy the notes.

In an action against the testator's representatives based on fraud,

Held, that the transaction by the testator was not fraudulent;

That the act of the corporation was not in violation of the statute of West Virginia against preferences by insolvents. *Schroeder v. Page*, 107.

Complaint alleging bad faith by reorganization committee which warrants accounting.

See CORPORATION, 8.

When judgment creditor of incompetent may rescind sale induced by fraud.

See DEBTOR AND CREDITOR, 8.

When conveyance not set aside as fraudulent.

See DEBTOR AND CREDITOR, 4.

Action to restrain unfair business competition — unnecessary to show fraud.

See INJUNCTION, 1.

Code of Civil Procedure, section 549, subdivision 4, denying recovery on contract unless fraud is proved, if alleged, inapplicable to Justice's Court.

See PLEADING, 12.

Action for damages for breach of contract and for fraud in inducing the same are inconsistent.

See PLEADING, 18.

Facts raising question for jury as to whether sale of stock was induced by fraud.

See SALE, 5.

See STATUTE OF FRAUDS.

GAME.

Sale of foreign grouse without giving bond.

See FOREST, FISH AND GAME LAW.

GAMING.

Fictitious transactions in stocks — when purchaser entitled to recover moneys advanced.

See CONTRACT, 7.

GAS AND ELECTRICITY.

Refusal to supply gas for failure of applicant to pay sums due from a former occupant — when penalty recoverable. The penalty and forfeiture imposed by section 65 of chapter 566 of the Laws of 1890 on a gas company for failure to supply an applicant with gas notwithstanding arrears are due from a former occupant of the building contemplates a continuation of the supply of gas after it has been begun. *Hoch v. Brooklyn Borough Gas Co.*, 882.

Right of electrical company to lay cables in New York city subways.

See MUNICIPAL CORPORATION, 1-4.

Injury by stepping upon electrically charged rail.

See NEGLIGENCE, 7.

GIFT.

When policies assigned to wife, if she survive insured, not liable to transfer tax.

See TAX, 2.

Transfer of securities to son made in contemplation of death.

See TAX, 4.

To charitable corporation not *in esse*.

See WILL, 9.

GUARANTY.

Action on oral promise of officer of corporation to pay debt of corporation.

See CONTRACT, 5.

Written guaranty to collect a chattel mortgage — parol evidence.

See CONTRACT, 15.

Allegation of performance of conditions precedent under section 533 of the Code of Civil Procedure in complaint against surety.

See PLEADING, 13.

GUARDIAN AND WARD.

Application by former guardian to remove successor — application refused when interest of infant not involved: When an attorney, who is also general guardian of an infant, has petitioned for a judicial settlement of his accounts and for the appointment of a successor and the latter has been appointed, an application to remove the new guardian should not be granted when it appears that it is made by the former guardian solely because the second guardian contested his right to compensation as attorney, and the proceeding is not brought in the interest of the infant. *Matter of Twichell*, 301.

Decree settling accounts void for failure to serve citation upon infant.

See ATTORNEY AND CLIENT, 8.

HABEAS CORPUS.

When not proper remedy to contest jurisdiction of criminal court.

See COURT, 4.

By brother to deprive parent of custody of daughter.

See PARENT AND CHILD, 1, 2.

HIGHWAY.

Injury to pedestrian on incline leading from roadway to sidewalk.

See MUNICIPAL CORPORATION, 13.

HUSBAND AND WIFE.

1. *Ante-nuptial agreement — when agreement not in lieu of dower.* A pecuniary provision made for the benefit of an intended wife must be made in lieu of dower to bar her right thereto. Dower is favored by the law, and if there be a reasonable doubt as to whether an ante-nuptial agreement was made in lieu of dower, the widow will take both.

When a man ninety years of age, in consideration of a contract of marriage made by a woman much younger than himself, agrees in writing that his executors shall pay a certain sum to his intended wife if he die within three years and a larger sum if he die within five years, and that after his death she shall be paid a monthly sum for her support until the division of his estate when "she is to be paid in full as her widow's dower in full," and such contract is followed by a ceremonial marriage, the ante-nuptial agreement should not be construed to have been made in lieu of dower and the widow is entitled both to the dower and the provisions of the contract.

(*Per* INGRAHAM, J.): The only effect of the acceptance of the provisions of the ante-nuptial agreement by the widow was to postpone her right to dower until final division of the estate, and when the will is invalid for unlawfully suspending power of alienation, the estate becomes at once divisible, the widow's right to the annuity ceases and she is entitled to her dower. *Brown v. Brown*, 199

2. *Divorce — admission of adultery by defendant at trial — collusion.* When at the trial of an action for divorce the defendant admits that he committed adultery in company with a detective whom the plaintiff had employed to watch him, and there is evidence that the offense was committed without the consent, procure-

HUSBAND AND WIFE — Continued.

ment or connivance of the plaintiff, and it appears from the defendant's testimony that he acted intentionally and deliberately, judgment for the plaintiff on the report of a referee should be entered.

Moreover, when the defendant has admitted other offenses not committed in company with the detective hired by the plaintiff, and the general allegations of the complaint as to adultery are amended to conform to the proof, the plaintiff is entitled to a decree. *Tuck v. Tuck*, 421.

Habeas corpus by brother to deprive parent of custody of daughter — effect of daughter's marriage.

See PARENT AND CHILD, 1, 2.

When deposit in trust for another is tentative — when widow of beneficiary not entitled to deposit.

See TRUST, 1, 2.

INCOMPETENT PERSON.

1. *Application for commitment under chapter 545 of the Laws of 1896.* An application for the commitment of an insane person to the State hospital brought under chapter 545 of the Laws of 1896, as amended, is not a special proceeding as defined by section 3334 of the Code of Civil Procedure. The application is *sui generis* and not governed by the general provisions of the Code of Civil Procedure relating to special proceedings. *Matter of Murtaugh*, 302.

2. *Same — unsuccessful petitioner not liable for costs — decree corrected by motion.* As by the amendment to section 64 of said act made by chapter 428 of the Laws of 1904, the provisions for awarding costs against an unsuccessful petitioner were stricken from the statute, an unsuccessful petitioner is entitled to be relieved from a decree charging him with costs.

A petitioner erroneously charged with costs in such proceeding is not required to appeal, but may move before the surrogate for a correction of the decree. *Id.*

When judgment creditor of incompetent may rescind sale induced by fraud.

See DEBTOR AND CREDITOR, 3.

INFANT.

Waiver of preference by default on motion therefor.

See PRACTICE, 13, 14.

Order of reference essential in proceeding to sell infant's real property.

See REAL PROPERTY, 6.

INHERITANCE.

Transfer tax upon.

See TAX, 2-5.

INJUNCTION.

1. *To restrain unfair business competition — facsimile reproduction of books published by plaintiff — injunction granted — practice — when denial of preliminary injunction reviewed on appeal.* When in an action for a permanent injunction a preliminary injunction has been denied in the court below, the Appellate Division will usually leave the question of the right to an injunction to be determined on the trial. But where it is apparent that no facts substantially different will be developed on the trial, and there is little or no dispute as to any material fact, but merely as to the conclusions to be drawn therefrom, the Appellate Division will determine the right to a preliminary injunction on appeal from the order denying it.

It appeared that for several years the plaintiff had published a set of holiday books of great artistic merit, though neither the matter nor the design was copyrighted. The defendants copied the set of books as near as possible by photographic processes, and though the work was inferior, the two productions were so nearly alike as to be calculated to deceive the public. In an action for an injunction, based upon unfair business competition,

Held, an injunction should be granted, as the defendants were unfairly and fraudulently attempting to trade upon the reputation which the plaintiff had built up for its books;

That, as the similarity of the products was so evident, it was unnecessary for the plaintiff to show that the defendants had a fraudulent intent or that any persons were actually deceived by the imitation. *Dutton & Co. v. Cupples*, 172.

INJUNCTION — Continued.

2. *Damage — when counsel fees proper on reference to assess damage.* When a motion for an injunction *pendente lite* has been denied and a preliminary injunction vacated and set aside, the defendant, on a reference to ascertain the damage sustained by reason of the injunction, is entitled to counsel fees incurred on the return to the order to show cause, if the injunction might have remained in force had the defendant failed to appear. *Reeves v. Sullivan*, 814.

To restrain entry upon private lands by contractor improving Erie canal without filing map, etc.

See EMINENT DOMAIN, 3.

When action does not lie to restrain acceptance of bid.

See MUNICIPAL CORPORATION, 8.

Right of adjoining owner to prevent building of a private railroad.

See MUNICIPAL CORPORATION, 9.

Complaint of village in action to abate nuisance must allege facts showing nuisance.

See NUISANCE, 7.

Supplemental summons to bring in lessee of an elevated railroad to defend injunction.

See PARTY, 1.

INSANITY.

Opinion of lay witnesses as to sanity — basis for opinion of experts.

See EVIDENCE, 2, 3.

Costs upon unsuccessful application for a commitment.

See INCOMPETENT PERSON.

INSOLVENCY.

Liquidating committee of corporation may defend suit as officers thereof.

See CORPORATION, 2.

See BANKRUPTCY, generally.

INSURANCE.

1. *Action on fire insurance policy — defense of breach of warranty in application — erroneous exclusion of evidence showing knowledge of danger from incendiarism.* When, in an application for fire insurance, the insured in answer to a question as to whether she had any reason to fear incendiarism answered no, and the defense in an action on the policy is that that representation was untrue, it is error to refuse to admit evidence to show that the husband of the insured prior to the insurance had told her about fires on the farm started by a particular person and had talked with her about fires from time to time. While such evidence might not be conclusive it is reversible error to exclude it as it bore directly on the issue. *Wells v. Glens Falls Insurance Co.*, 346.

2. *Assignment by beneficiary of interest in gratuity fund, as collateral, contrary to provision therein.* The by-laws of the New York Produce Exchange prohibit the assignment or pledge of any interest in the gratuity fund of the exchange by a beneficiary except in so far as necessary to keep the interest of the member alive.

An assignment by such beneficiary made before the death of the insured as security for the repayment of loans made by the assignee to the insured during his lifetime is void. *Holmes v. Seaman* (No. 2), 381.

3. *Same — sustained as to moneys advanced to keep policy alive.* The assignment is enforceable to the extent of moneys paid by the assignee to keep the policy alive. *Id.*

4. *Same — second assignment without consideration.* Although such policy becomes assignable by the beneficiary after the death of the insured, yet, when without any new consideration, one who has advanced moneys to the insured during his lifetime and holds an assignment of the policy by the beneficiary procures a second assignment by representing to the beneficiary that it is made simply to confirm the prior assignment, and upon representations that he had a right to

INSURANCE—*Continued.*

the assignment by reason of moneys advanced to the insured and concealing from the beneficiary his true reasons for the second assignment, the latter is void and ineffective to vest the assignee with a right to the proceeds of the policy except for sums advanced to keep it alive.

The fact that at the time of the second assignment the assignee agreed to allow the beneficiary to deduct from the proceeds of the policy sufficient money to bury the insured does not furnish a consideration for the assignment. *Id.*

5. *Change of beneficiary procured on forged documents — when assignee of insured not entitled to recover.* In an action to recover upon two duplicate policies of life insurance, of which the plaintiff was assignee, it appeared that the policies were originally issued to the insured, payable to his wife, and in case of her death to her children; that the wife died, leaving one son surviving, and that thereafter the defendant insurance company issued a paid-up policy in place of one of the former policies, payable to the same beneficiaries; that thereafter the insured presented affidavits, verified by himself, stating that his safe had been broken into and the policies stolen, and requesting the issue of duplicates, which statement that the policies were stolen was untrue, they being at the time in the possession of the son of the insured, who was the ultimate beneficiary. The defendant company issued duplicate policies on receiving bonds of indemnity from the insured and beneficiary, but the signature of the latter was forged. Thereafter the insured applied to the plaintiff for a loan on the policies, and the plaintiff required that the beneficiary be changed so that the policies should be payable to the insured or his estate, whereupon the plaintiff and the insured presented to the defendant company the duplicate policies, with instruments purporting to be signed by the insured and the beneficiary, asking that the beneficiary be changed. The signature of the beneficiary, however, was a forgery. Relying upon such documents, the beneficiary was changed and the change indorsed upon the policies, whereupon the plaintiff, on behalf of a third person, loaned the insured money on the policies and took an assignment thereof to the third person as collateral security. The beneficiary, on requiring the payment of dividends, was informed of the assignment by the insured, and he thereupon notified the defendant that he was the owner of the policies, and that the instruments purporting to be signed by him were forgeries. The third person assigned his interest in the policies to the plaintiff, who had guaranteed the payment of the loan when it was made. Thereafter the insured died and the beneficiary recovered on the original policies in an action in another State.

The plaintiff as assignee bringing action against the insurer on the duplicate policies, it was

Held, that a dismissal of the complaint was proper as the plaintiff when he took the assignment from the third person had information of the fraud and forgeries committed by the insured, and because instead of recalling the loan and prosecuting the insured, he was instrumental in having the loan renewed;

That the plaintiff as assignee was not an innocent holder in good faith;

That the defendant insurance company was not estopped by its act in changing the beneficiaries inasmuch as the change had been induced by the acts of the plaintiff;

That, as the insurer was not liable to the insured by reason of the fraud, it was not liable to the assignee of the insured. *Black v. Mutual Life Insurance Co.*, 449.

6. *Reserve fund — determination of amount thereof — when section 52 of the Insurance Law applies.* When an insurance company originally organized as a fraternal organization has thereafter successively incorporated as a mutual company and as a stock company, under chapter 690 of the Laws of 1893, the valuation of policies issued when the corporation was a mutual company for the purpose of ascertaining the amount of reserve, should be made under section 53 of the Insurance Law, if such valuation does not violate any provision, express or implied, of the original contract of insurance. The reserve need not be determined by valuing such policies as whole life policies under section 86 of the Insurance Law.

In the absence of any contract between the parties as to how a policy shall be valued in order to estimate the amount of reserve to be carried, the Legislature may determine the method of arriving at such valuation. *Elder v. Bankers' Life Insurance Co.*, 722.

INSURANCE — Continued.

7. *Reorganization of assessment company as stock company — when reserve under section 84 of the Insurance Law sufficient to cover former policies.* An insurance company organized as a fraternal organization thereafter organized under the assessment plan and later as a stock company. On organizing as an assessment company it was provided that members of the former class A should be assessed one dollar for each death and that there should be set aside a fund of one dollar per 1,000 on all insurance issued on the new class B, which fund should go to meet any deficit in assessments of class A when the membership dropped below 1,000. This mortuary fund of class B was continued until the corporation organized as a stock company, when it was discontinued as no longer required. Upon the last reorganization the company carried a reserve figured under section 84 of the Insurance Law, the reserve being applicable to all classes of policies.

Held, that a sufficient reserve was maintained on the policies of former class A, and that a holder of such policy was not entitled to have an additional reserve of one dollar per 1,000 on new insurance. *Kelshaw v. Bankers' Life Insurance Co.*, 726.

8. *Dividends may be paid from surplus only.* An insurance company can only pay dividends out of surplus and profits; they cannot lawfully be paid out of capital contributed by shareholders for the purpose of carrying on the company's business and for the protection of its creditors. Such dividends are prohibited by section 594 of the Penal Code and section 83 of the Insurance Law. *Berryman v. Bankers' Life Insurance Co.*, 730.

9. *Same — when policyholder cannot recover dividend illegally declared.* Although illegal dividends, which depleted the capital, have been declared, a policyholder who has not yet drawn his dividend cannot compel the payment thereof, when the payment would necessarily be made out of the capital and not out of the surplus, as the officers of the corporation would be required to do an illegal act. *Id.*

10. *Sims — when company cannot recover former dividends paid.* But when former dividends paid to the insured are not shown to have impaired the capital, they cannot be recovered by the insurer or declared to be a lien upon the policy on the ground that they were not formally declared by the board of directors or by the executive committee, if neither the charter nor the by-laws specifically provided by whom the dividend should be declared.

When such company has paid dividends to a policyholder who stands in the position of a creditor without notice of any infirmity in the manner in which the dividend was declared, the payment must be considered to have been voluntary and cannot be recovered. Even though the payment were unauthorized, the acquiescence of the company therein is a ratification, and the payment cannot be charged as an offset against the policy. *Id.*

When facts show intention to cancel fire insurance policy — effect of refusal of company to "mark off" policy at request of agent — "mark off" defined — ratification of acts of agent.

Brutwell v. Globe & Rutgers Fire Insurance Co., 904.

Action by a mortgagee for fire insurance moneys received by mortgagor under contract to rebuild — liability of cotenant not joining in mortgage.

See MORTGAGE, 4-7.

When policies assigned to wife, if she survive insured, not liable to transfer tax.

See TAX, 2.

INTEREST.

When agreement to arbitration warrants judgment for interest — right to interest as matter of law.

See ARBITRATION.

Recovery of interest barred by receipt in full for amount of award upon taking lands for park purposes.

See EMINENT DOMAIN, 7.

Against surety from time when liability is determined.

See PRINCIPAL AND SURETY, 2.

INTOXICATING LIQUORS.

1. *Sale of liquors on Sunday.* In order to justify a hotelkeeper in selling liquor on Sunday it must appear that the person to whom the liquor is sold is one who in good faith occupies a room in the hotel, or who during the hours when meals were regularly served resorted to the hotel for the purpose of obtaining and actually orders and obtains at such time in good faith a meal.

The burden to show this is upon the hotelkeeper.

A hotelkeeper may serve liquor to a transient guest on Sunday, but the situation must be such as to indicate to a person of ordinary intelligence that the guest resorted to the hotel to obtain a meal in good faith and that the liquor was ordered as an incident to the meal and not that the object was to obtain liquor by ordering some article of food to accomplish that purpose. *Matter of Clement (Martin Certificate)*, 5.

2. *Same—when sale by hotelkeeper not made to guest.* When it appears that the defendant sold liquor on Sunday in a room annexed to the bar to persons who came and went, and that the only meals served consisted of sandwiches, served on a plate without knives or forks or any of the usual accessories of a meal, a finding that the defendant was actually serving guests with meals as distinguished from supplying customers with liquor cannot be sustained. *Id.*

3. *Conditions precedent to rebate on surrendered certificate.* To entitle the holder of a liquor tax certificate to a rebate on surrendering the same under section 25 of the Liquor Tax Law the burden is upon the holder of the certificate to establish as a condition precedent to the right to rebate (1) that there is no complaint, prosecution or action pending on account of a violation of the Liquor Tax Law; (2) that the person surrendering has not violated any provision of the law during the excise year for which the certificate was issued; (3) that the certificate was surrendered before arrest or indictment for a violation of the law; (4) that the person surrendering has ceased to traffic in liquors during the term for which the tax was paid. *People ex rel. Munch Brewery v. Clement*, 539.

4. *Mandamus—answer raising questions of fact—peremptory writ denied.* Where the petition on mandamus to compel the Commissioner of Excise to pay the rebate admits that an agent or employee of the owner was arrested and convicted for illegally selling liquor on Sunday, and the answer denies the conditions precedent aforesaid alleged by the petition, and affirmatively sets out that the holder personally and by her agents and servants sold liquor on Sunday, etc., an issue of fact is raised and the relator is entitled only to an alternative writ; the granting of a peremptory writ is improper. *Id.*

JOINDER.

Of parties.

See PARTY.

JUDGMENT.

1. *Action to charge joint debtor not served—pleading—amendment at trial.* In an action under section 1937 of the Code of Civil Procedure to charge a joint debtor not personally served in a prior action, a motion to amend the complaint at trial to show that the defendant was not served in the prior action should be granted when it is manifest that the plaintiff attempted to state a cause of action under the section. But a failure of the court to grant such proper amendment does not entitle the defendant to a reversal of judgment for the plaintiff. *Hofferberth v. Nash*, 284.

2. *Same—defense of Statute of Limitations.* Under the former Code of Procedure the proceeding to charge a joint debtor not served was a proceeding in the prior action; but under the provisions of the Code of Civil Procedure it is not a proceeding in the former action, but is a new action. Hence prior decisions that the defendant not served could not plead the Statute of Limitations unless it had run before the original action are not applicable.

The present action is not an action upon the former judgment for the purpose of extending the lien thereof; hence, leave to bring the action is not necessary.

As the present action is a new statutory action, the defendant is entitled to plead the Statute of Limitations as a defense, the period of limitation being ten years, as provided in section 388 of the Code of Civil Procedure. The ten years begin to run from the date the former judgment was recovered. *Id.*

3. *On substituted service—when default not opened.* When after diligent effort by the plaintiff to obtain service of summons on the defendant without success,

JUDGMENT — *Continued.*

an order for substituted service has been made and judgment in the action has been taken after default, the judgment should not be vacated or the default opened when the defendant's attorney admits that he received the summons and complaint before the entry of judgment, but was unable to communicate with the defendant, who was within the State. An attorney unable to communicate with his client under such circumstances should have appeared and obtained an extension of time to answer.

Although section 445 of the Code of Civil Procedure permits a defendant to be let in to defend, when the proposed answer states no defense, the judgment will not be vacated. *Bishop v. Hughes*, 425.

4. *Same* — *excessive damages*. When the complaint, served by substituted service, asked for an injunction compelling the defendant to remove his personal property from the plaintiff's premises and the judgment on default allows excessive money damages, the defendant should be let in to defend the claim for damages unless the plaintiff consent to strike the same from the judgment. *Id.*

When discharge in bankruptcy of individual partner *res adjudicata* as to partnership debts.

See BANKRUPTCY, 2.

Recovery less than offer thereof — costs to defendant from time of offer.

See COSTS, 3, 4.

Only one judgment authorized upon several demurrers.

See DEBTOR AND CREDITOR, 3.

Judgment on foreclosure admitted to show deficiency in action for money had and received.

See MORTGAGE, 6.

Prior decision *res adjudicata* on motion.

See PLEADING, 8.

Proof of action on contract warrants recovery although conversion is also stated.

See PLEADING, 11.

Judgment not opened when proposed answer fails to allege defense.

See PRACTICE, 4.

Prior judgment as bar on application of receiver to sell debtor's interest in real property.

See SUPPLEMENTARY PROCEEDINGS.

Decision settling accounts of trustee does not authorize continuation of illegal accumulations.

See WILL, 4.

JURISDICTION.

Of court.

See COURT.

JURY.

Agreement in criminal action.

See TRIAL, 1, 2.

LABOR LAW.

See MASTER AND SERVANT, generally.

LANDLORD AND TENANT.

1. *Covenant by tenant to make repairs* — *liability of tenant on surrendering building in bad condition*. Where a tenant covenants to make all needful repairs to the premises during the term, and to surrender them in as good state as reasonable use and wear will permit, etc., the tenant upon leaving the premises in poor condition is liable for the cost to the landlord of putting them in proper repair. *Appleton v. Murx*, 206.

2. *Same* — *tenant not relieved by covenant of new tenant to repair*. This rule holds, although before the expiration of the term the landlord leased the premises to a third party, who makes a similar covenant to put the demised premises in repair, by which the cost of putting the premises in repair fell upon the new

LANDLORD AND TENANT — *Continued.*

tenant. This, because the tenant surrendering the premises is not a party to the agreement.

But the landlord in making repairs cannot charge the outgoing tenant with the cost of installing a new elevator and pump when the old elevator was capable of repair.

Other item for cost of painting disallowed. *Id.*

3. *Covenant for perpetual renewal.* A definite covenant for the perpetual yearly renewal of a lease is not void.

Thus where the tenant, its successors and assigns have the privilege of renewing the lease from year to year upon notice in writing, the covenant is not indefinite, and when the landlord refuses to renew the lease and seeks to dispossess the tenant his petition in summary proceedings should be dismissed. *Hoff v. Royal Metal Furniture Co.*, 884.

When lessee of railroad may enjoin unlawful appropriation of street by a state contractor.

See EMINENT DOMAIN, 4.

When court will not order summary cancellation of a lease by receiver of rent, and profits.

See MORTGAGE, 1-3.

Action against landlord for injury caused by fall of dumbwaiter.

See NEGLIGENCE, 1.

Liability of landlord for injury caused by defective construction of building — reasonable care in erecting building of sufficient strength to withstand storms — liability where tenant erected building.

See NUISANCE, 1-5.

Supplemental summons to bring in lessee of an elevated railroad to defend injunction.

See PARTY, 1.

LARCENY.

Conviction of accomplice for larceny in the second degree.

See CRIME, 3.

Conviction for larceny in the second degree in failing to return a diamond ring.

See CRIME, 4.

Conviction for false representation concerning a bond upon which defendant obtained a loan.

See CRIME, 6.

LAWS.

[For tables of Session Laws and Statutes cited and construed in this volume, see *ante*, pp. lv-lx.]

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

Power of Legislature to confer jurisdiction to revoke license without notice.

See CONSTITUTIONAL LAW.

LIBEL.

1. *Partial defense not pleaded as demurrable.* When a publication not naming the plaintiff, but alleged to have been printed of and concerning her, contains accusations of murder, robbery and illicit relations with the person murdered, defenses not set out as partial defenses nor in mitigation, which do not in any way justify the charges of murder or robbery, are bad on demurrer, although they may justify the accusation of illicit relations. *Nunnally v. New Yorker Zeitung Publishing Co.*, 1.

2. *Same — allegation that article was published of and concerning the plaintiff.* Although no specific person is named in such article as guilty of the offenses charged, the plaintiff may allege that it was published of and concerning her, and the complaint is good, as under such allegation direct proof may be made that she was the person referred to. *Id.*

LIBEL — *Continued.*

3. *Criticism of newspaper artist.* When an artist submits his work to the public no one is answerable for fair comment or criticism thereon. *Outcault v. New York Herald Co.*, 534.

4. *Same* — *when complaint must show actionable meaning of words by innuendo.* When a newspaper illustrator who has published a series of comic cartoons known as the "Buster Brown Series" is charged in an article with having run out of ideas, and it is stated in substance that the popularity of the series is waning, etc., the publication is not libelous *per se*, nor does it attack the author in his general capacity or reputation as an artist, and a complaint for libel thereon is subject to demurrer unless the actionable meaning of which the words are capable is pointed out by innuendo. *Id.*

LICENSE.

Revocation of license to sell milk in the city of New York without notice.
See CONSTITUTIONAL LAW.

LIEN.

When defendant settling action bound by lien of plaintiff's attorney — jurisdiction as against foreign defendant.

See ATTORNEY AND CLIENT, 1-6.

Vendee entitled to equitable lien on lands to the extent of consideration paid.
See VENDOR AND PURCHASER, 3-5.

LIMITATION OF ACTION.

Presumption of payment after twenty years.

See EVIDENCE, 11.

Statute of Limitations in action to charge a joint debtor not personally served in a prior action.

See JUDGMENT, 2.

Statute does not run on liability of executors and beneficiaries for inheritance tax.

See TAX, 5.

LIQUOR TAX LAW.

See INTOXICATING LIQUORS.

LIS PENDENS.

In action for specific performance of personal covenant by grantee.

See REAL PROPERTY, 1.

MANDAMUS.

Denials insufficient — *when alternative writ unnecessary.* When the allegations of a petition for a writ of peremptory mandamus to obtain an allotment of space for electric wires in subways in the city of New York are positive and explicit, and are merely met by the denials of knowledge or denials which do not raise issues of fact, and merely state conclusions of law, the court may consider the right to a peremptory writ without issuing the alternative writ. *Matter of Long Acre Electric Light & Power Co.*, 80.

By stockholder to obtain inspection of books.

See CORPORATION, 4.

To compel inspectors to reconvene and certify result.

See ELECTION LAW, 2.

Peremptory writ denied where answer raises question of fact as to selling of liquor on Sunday.

See INTOXICATING LIQUORS, 4.

MASTER AND SERVANT.

1. *Negligence* — *when manager of business not servant* — *admission by answer.* When the plaintiff who was hired by the defendant's brother to work in a livery stable and was injured while endeavoring to start a gas engine, alleges that the brother was the defendant's manager and superintendent, which the defendant admits by answer, it is established so far as the management of the business is

MASTER AND SERVANT — Continued.

concerned that the brother was the *alter ego* of the defendant. *Tinan v. Keahon*, 50.

2. *Same—delegation of duty to give instruction.* A master cannot escape responsibility by delegating to another the duty to give instruction to servants as to the operation of dangerous machinery. Hence, when the plaintiff, employed as a laborer, was directed to start a gas engine without instruction and was injured thereby, and there is evidence showing that such work necessitated instruction, the master is liable. *Id.*

3. *Injury to workman by fall of temporary bridge—detail of work—negligence of fellow-servant.* In an action to recover for an injury caused by the collapse of a part of a temporary bridge or scaffold which was in use during the alteration of a building, it appeared that the superintendent had marked a place about midway between two of the upright supports at which the bridge was to be cut off. By direction of his foreman the plaintiff sawed across the bridge at the place indicated. As the last stretcher was severed the part of the bridge upon which the plaintiff was standing collapsed. Before the plaintiff had finished the cut a fellow-servant notified the superintendent that a support was needed under the part upon which the plaintiff was working. There was timber on hand which was suitable for such purpose.

Held, that the accident was caused by the defective method adopted in removing the bridge;

That the removal of such a structure was not a use thereof but a detail of the work in the performance of which the superintendent, foreman and workmen were fellow-servants, and for an accident resulting from the method employed the master was not liable;

That as no expert knowledge was involved and the superintendent and foreman were not shown to have had any knowledge of the conditions which the plaintiff did not possess, they were jointly negligent in failing to provide the proper supports. *Connolly v. Hall & Grant Construction Co.*, 387.

4. *Negligence—injury by planing machine—when danger not obvious.* The danger of injury from the exposed cutting edges of the shaft of a planing machine which revolved, in an open space between covered rollers, so rapidly as to look like a smooth roller, is not obvious to a boy of nineteen years of age, who has only worked at the machine for two hours, and a recovery for injuries sustained is warranted, where he was directed to remove shavings collecting near the shaft without instructions.

Under such circumstances, the fact that the plaintiff removed the shavings with his hand instead of with a stick is not contributory negligence as a matter of law. *Smith v. Wesel Manufacturing Co.*, 834.

5. *Negligence—injury by fall of hoist—Labor Law construed.* Section 18 of the Labor Law, regulating scaffolding, hoists, stays, etc., and prohibiting the use of such appliances if not so constructed as to give proper protection to persons employed, makes the master liable for the use of such appliances even though they be negligently put up by fellow-workmen of the servant injured. *Haggblad v. Brooklyn Heights Railroad Co.*, 838.

6. *Same—pleading.* A plaintiff suing to recover for an injury to a decedent from such a cause need not plead the statute in order to make the same available. *Id.*

7. *Same—res ipsa loquitur.* When a structure used for the purpose of hoisting beams to an elevated railway falls and an employee is killed thereby, the case is brought within the doctrine of *res ipsa loquitur*, and the question of the defendant's negligence should be submitted to the jury, although the decedent helped his fellow-workmen to fasten the hoist in place. *Id.*

Contract of employment not to be performed in one year—recovery upon executed contract although not in writing—when percentage of profits not permissible in action on *quantum meruit*.

See CONTRACT, 4.

When no consideration for additional compensation.

See CONTRACT, 18.

MASTER AND SERVANT — *Continued.*

Injury to motorman by "plow" of car catching in slot rail.
See NEGLIGENCE, 2.

When pedestrian injured at railroad crossing not a regular employee of the defendant.

See NEGLIGENCE, 5.

MISTAKE.

Sale — mutual mistake — when corrected.
Green v. Smith, 920.

MONEY RECEIVED.

Action by a mortgagee for fire insurance moneys received by mortgagor under contract to rebuild — liability of cotenant not joining in mortgage.

See MORTGAGE, 4-7.

When action against attorney to recover money deposited should be for money received, not for a conversion.

See PLEADING, 6.

MORTGAGE.

1. *Foreclosure — lease by receiver of rents and profits — lease not canceled by summary application.* When in an action to foreclose a purchase money mortgage, a receiver of the rents and profits, who is authorized to lease the premises, continues the lease to the tenant then in possession in consideration of an agreement by the tenant to expend money in repairs, the court is without jurisdiction to order a summary cancellation of the lease. *Witthaus v. Capstick, 212.*

2. *Same — repairs — right to recover therefor.* It seems, moreover, that in an action in equity to compel the cancellation of the lease the tenant would be entitled to protection for the amount expended by him in repairs. *Id.*

3. *Same.* On such summary application to cancel the lease it is immaterial that the receiver of the rents, though appointed as receiver of only a nine-tenths undivided part of the premises, made a lease of the whole premises. *Id.*

4. *Action by mortgagee for fire insurance moneys had and received by mortgagor under contract to rebuild.* A complaint which alleges in substance that the plaintiffs, as mortgagees, and entitled to be paid the proceeds of fire insurance on the premises, consented to the payment of a loss to the mortgagors upon their promise to use the sum in erecting a new building upon the premises equal in value to that destroyed and the failure of the mortgagors to fulfill that promise, states a cause of action for money had and received. The failure of the mortgagors to fulfill the promise imposes upon them an obligation to repay the insurance money received by them to the mortgagees and on failure to do so they hold the same as money had and received. *Miller v. Harris, 395.*

5. *Liability of cotenant not joining in mortgage.* When, however, it appears that an owner of an undivided interest in the property did not join in the mortgage and was not liable for the amount secured to be paid and had no knowledge of the mortgage or even of her interest in the property, a judgment against her for money had and received is not warranted upon mere proof that she signed the proof of loss and indorsed the check of the insurance company, which were presented to her for signature by the other mortgagors, and when there was no promise to erect a building made by her or on her behalf. *Id.*

6. *Evidence — judgment in foreclosure to show deficiency.* In such action for money had and received the record of the judgment and sale on foreclosure is properly admitted in evidence to show that the amount due on the mortgage had not been paid, this being a prerequisite to an action for money had and received. *Id.*

7. *Same — declarations against interest of joint mortgagors.* The declarations of the mortgagors who acted together in obtaining the insurance money is admissible against them but not against the other owner of the property. *Id.*

Presumption of payment after twenty years.

See EVIDENCE, 11.

When title of State not divested by foreclosure.

See REAL PROPERTY, 2.

MORTGAGE—Continued.

Presumption of payment after twenty years.

See VENDOR AND PURCHASER, 6.

MOTION AND ORDER.

Order, not opinion, governs the appellate court.

See APPEAL, 4.

Leave of court necessary to second motion to amend complaint.

See PLEADING, 7, 8.

Effect of prior order permitting suit as poor person upon order requiring non-resident to give security for costs.

See PRACTICE, 11.

MUNICIPAL CORPORATIONS.

1. *When municipal franchise can be sold.* When an electric lighting company holding a municipal franchise grants to an individual the "sole and exclusive right and privilege to operate for all purposes, under the franchise * * * granted * * * by the Board of Aldermen," etc., it is a complete assignment of the franchise, leaving no right or reservation to the assignor.

While as a general proposition a corporation, chartered to perform public or quasi public duties cannot alienate its franchise without legislative authority, yet the rule is subject to many exceptions and qualifications and the modern tendency is towards a relaxation of the rule.

The reason for the rule against the alienation of the franchise is that by divesting itself of the franchise, the corporation would disable itself from discharging its public duties, and that, therefore, the public is entitled to forbid the transfer. *Matter of Long Acre Electric Light & Power Co.*, 80.

2. *Same—ratification of assigned franchise by municipality.* But the grantor of the franchise may ratify and confirm an alienation thereof although made without prior authority. This ratification need not assume any particular form, and may be evidenced by acts which recognize the validity of the assignment, and which are inconsistent with any objection thereto. *Id.*

3. *Same—subways in city of New York.* Thus, when an electric company was granted a franchise by the municipal authorities of the city of New York in 1887, giving it a right to erect poles and wires and construct and use wires and conduits over and under the streets of the city, for which compensation was made to the city, a special franchise was created, and when the grantee has assigned the same to an individual, and the right has passed by subsequent assignments to another corporation which has been allowed by the municipal authorities to erect and maintain poles and wires in said city, the acquiescence of said city is *prima facie* a ratification of the assignment of the franchise originally given and entitles such corporation to lay its wires in the conduits of the Consolidated Telegraph and Electrical Subway Company, which is required to furnish space to corporations "having lawful power to operate electrical conductors in any street, highway or public place in the city."

Moreover, such subway company is a private corporation, operating for its own gain, and is invested with no authority to grant or withhold privileges or to discriminate between lawful applicants for space in its conduits. It is vested with no governmental function and does not represent the State or city. Hence, as the question as to whether such franchise may be assigned is a matter of public concern only, and such assignment not being *malum in se*, it is not a question which can be raised collaterally by the subway company, but is available only by the municipality. *Id.*

4. *Same—right of electrical company to lay cables therein.* It is not held, however, that said subway company is obliged to assign space to every applicant and that it may not inquire whether the applicant has a right to enter, but it has no right to refuse an applicant having an apparent franchise acquiesced in by the public authorities.

It is not necessary for such applicant to obtain a permit from the commissioner of water, gas and electricity before applying for an allotment of space in said subways.

When such subway company bases its refusal to allot a space in the conduits on the sole contention that the applicant has no lawful power to operate electrical

MUNICIPAL CORPORATIONS — Continued.

conductors in the city, it cannot maintain that the space at present available is insufficient. *Id.*

5. *Certiorari to review dismissal of police officer — evidence insufficient to show misconduct of officer.* When on certiorari to review the dismissal of a police officer in the city of New York for conduct unbecoming an officer, it appears that the relator was discharged for accepting money in violation of rule 22 of the Police Manual, and the only evidence in support of the charge was the fact that a witness whose son had been arrested by the relator had threatened to get even with him, and had under an agreement with the police inspector thrust money into the relator's hand while the latter was on duty and immediately ran away and boarded a car, the dismissal is not warranted by the evidence and the relator is entitled to reinstatement. *People ex rel. Maguire v. Bingham*, 192

6. *Certiorari to review dismissal of police officer — facts not warranting dismissal.* Certiorari to review proceedings had on the dismissal of a police officer in the city New York, who was charged with neglect of duty and conduct unbecoming an officer. On the charge that the officer had been absent from his post and had neglected to report his absence it appeared that he had absented himself from his post for three minutes by reason of information given to him that his brother was in a hospital suffering from a fractured skull. It also appeared in regard to his failure to enter his absence from duty on the books at the station house, that as soon as he reported there he was ordered to report forthwith at another place, and that in going to his assignment he stopped for a few minutes to take food and proceeded by surface car which was delayed. On all the evidence, *Held*, that neither the three minutes' absence from duty under the circumstances, nor his failure to enter his absence on the police records was ground for dismissal;

That the delay in arriving at the place where he was ordered to report was excusable;

That the fact that the officer when reporting to headquarters by telephone in respect to a crime did not state that he was a patrolman was not ground for dismissal, there being no rule requiring him to make that statement;

That while the statute vests discretion in the police commissioner to determine the punishment to be inflicted on officers, the charges must be substantial and sustained by the evidence, and the extreme penalty should not be imposed for a mere technical violation of a rule whereby the rights of the department have not been prejudiced. *People ex rel. Gannon v. McAdoo*, 488.

7. *Proposals for contract for pumping engines — requirement that bidder give evidence of ability to perform.* A provision in proposals for a municipal contract for pumping engines that the bidders shall give satisfactory evidence that they have built the type of engines required and are able to complete the work as specified, is for the benefit of the city and intended to exclude irresponsible bidders unable to complete the contract. It is not for the benefit of other or higher bidders, nor does it bind the city to reject bids because the bidder does not fully comply with the express requirements as to proof of ability to perform. *Nathan v. O'Brien*, 664.

8. *When interested taxpayer cannot restrain acceptance of bid.* Thus when the lowest bidder has permitted the city engineer to investigate the pumps supplied by it to other public works, and the municipal authorities decide to accept the bid, a taxpayer who is connected with a bidder \$68,000 in excess of the bid accepted cannot enjoin the letting of the contract on the theory that the lower bidder did not give adequate proof of ability to perform, where there does not appear to be any other person who refrained from bidding by reason of the provision aforesaid.

Taxpayer's actions are brought to allow the illegal acts of public officials to be controlled by courts and to protect the corporation. They are not allowed for the purpose of enabling corporations or individuals to require the award of a public contract on bids in excess of those made by other competent and responsible bidders.

When it appears that such action is not brought for the interest of the municipality but for the ulterior purpose of imposing an additional burden on the municipality by an interested taxpayer, a court of equity will not enjoin the letting of a contract to a bidder who is responsible. *Id.*

MUNICIPAL CORPORATIONS — Continued.

9. *Grant of right to build private railroad in city of New York unauthorized.* The board of estimate and apportionment of the city of New York is without authority to grant to private persons the right to construct a private railroad on or under the city streets for the sole purpose of transporting their own goods.

The amendments to sections 17, 28, 41, 43, 44, 45, 47, 48, 50, 72, 73, 74, 75 and 242 of the charter of Greater New York, made by chapter 629 of the Laws of 1905, deprived the board of aldermen of the power to grant franchises to construct and operate railroads in the city streets and conferred that power solely upon the board of estimate and apportionment.

Said amendments did not grant any new powers to the board of estimate and apportionment not theretofore possessed by the board of aldermen in relation to the granting of such franchises.

Said section 242 of the revised charter confers no authority on the board of estimate and apportionment to grant to a private person or corporation the right to build such private road, for all the powers conferred by that section may be exercised solely for the benefit and in the interest of the public at large.

Such special privilege cannot be granted whether it be considered as a franchise or not; or whether the grantee does not intend to act as a common carrier for the benefit of the public.

The power to make such grant was not heretofore possessed by the board of aldermen or other local authority and was not transferred by the legislation aforesaid to the board of estimate and apportionment.

Such grant is unauthorized because it takes public property for private use. *Hatfield v. Straus*, 671.

10. *Same — injunction to adjoining owner.* When said board of estimate and apportionment has granted to a private person the right to build and maintain such private railroad, an adjoining owner whose access to his property will be invaded by the tracks and whose property will be diminished in value thereby may sue for a permanent injunction.

The plaintiff under such circumstances is entitled to an injunction *pendente lite*, and the decision as to his right thereto should be made before the road is built and not afterwards. *Id.*

11. *Negligence — when city liable for damages caused by sewers.* When the destruction or dilapidation of a sewer is the result of ordinary use which ought to have been anticipated and could have been guarded against by occasional examination and cleansing, the omission to make the examination and keep the sewer clear is a neglect of duty which renders the municipality liable for injuries caused thereby.

Thus where the sewer was constructed above ground and there is evidence showing that the injuries to the plaintiff's premises were caused by a break in the sewer by reason of the negligence and carelessness of the defendant in maintaining the sewer, the plaintiff is entitled to recover. *Gravey v. City of New York*, 773.

12. *When clerk of board of education of city of New York not entitled to salary during suspension.* As section 1067 of the charter of Greater New York provides that employees of the board of education may be removed for cause at any time by a three-fourths vote of the board, and may be suspended pending the trial of charges, a clerk in the bureau of supplies of said board who has been properly dismissed from service is not entitled to recover his salary for the period of his suspension pending the trial.

It is the intent of said statute that the dismissal relate back to the time of suspension. *People ex rel. Curren v. Cook*, 788.

13. *Negligence — injury to pedestrians on incline leading to crosswalk.* It is for the jury to say whether a municipality is liable for injuries received by a fall on an obstruction in a city street built to enable an adjoining owner to draw wagons from the street, which consists of an arched, sloping way, six or seven feet long, eighteen inches wide and six inches high, dropping from the curb to the crosswalk, which has been maintained for five years, and upon which other pedestrians have fallen.

A pedestrian who slips upon such obstruction in the daylight is not guilty of contributory negligence as a matter of law. *Stratton v. City of New York*, 881.

MUNICIPAL CORPORATIONS — *Continued.*

Liability for injury to pedestrian from falling over a loose flagging lying upon a sidewalk which was being repaired — contributory negligence.
Brown v. City of New York, 901.

Liability of municipality for unauthorized arrest at instigation of street cleaning department.

See ASSAULT AND BATTERY.

Revocation of license to sell milk in the city of New York without notice.

See CONSTITUTIONAL LAW.

Facts showing waiver by city of delay by paving contractor.

See CONTRACT, 6.

Damages to abutting owners by construction of underground railway — counsel fees and necessary expenses allowed.

See EMINENT DOMAIN, 1.

Condemnation of existing water works without consent of State Water Commission.

See EMINENT DOMAIN, 5.

Acquisition of piers by city of New York — compensation for "shedding license" taken.

See EMINENT DOMAIN, 6.

Taking lands for park purposes in city of New York — when interest on award barred.

See EMINENT DOMAIN, 7.

Injury to pedestrian on defective sidewalk — notice of prior injury.

See NEGLIGENCE, 8, 9.

Fall of pedestrian on icy crosswalk.

See NEGLIGENCE, 10.

Village may sue to enforce order of board of health.

See NUISANCE, 6.

Evidence showing good faith of municipality settling action for which private contractor must indemnify the city.

See PRINCIPAL AND SURETY, 1.

Duty of city of Yonkers under covenant to keep docks in Hudson river unobstructed.

See REAL PROPERTY, 8.

MURDER.

Conviction for murder in second degree sustained.

See CRIME, 1.

NEGLIGENCE.

1. *Injury by dumbwaiter — verdict against weight of evidence.* The plaintiff, a tenant, was injured by the fall of a dumbwaiter on the premises, and claimed that the rope was defective and that the landlord had been notified of the defect.

The evidence considered, and

Held, that a verdict for the plaintiff was against the weight of evidence.
Muller v. Vesell, 72.

2. *Injury to motorman by "plov" of car catching in slot rail.* A recovery for an injury to a motorman from the sudden stopping of his car cannot be sustained on the theory that the accident was caused by the negligence of the defendant in failing to furnish safe appliances where the car was stopped by the "plov," which connected the car with the underground cable, catching in the slot rail, due to the fact that the rail had closed up so that the slot for a short distance was but one-half inch in width instead of the usual three-quarters. The defendant cannot be charged with negligence in failing to anticipate that such an accident might occur, even if it had notice of the defect in the rail. *McCann v. Interurban Street Railway Co.*, 188.

3. *Collision between wagon and street car — when failure to signal immaterial.* In an action to recover for personal injuries received from the collision of a street car with a grocery wagon upon which the plaintiff was riding, where

NEGLIGENCE — Continued.

the plaintiff has failed to except to a charge that the driver of the wagon was the agent of the plaintiff and that his knowledge was imputable to the plaintiff, it is error for the court to refuse to charge that if the driver saw the approaching car it was unimportant whether or not the bell was sounded. *Kerin v. United Traction Co.*, 314.

4. *Trespasser on railroad struck by train — expert testimony raising question of fact as to ability to stop train.* The plaintiff, a trespasser, was struck by a freight train while his foot was caught in a cattle guard in the defendant's track, and seeks to recover damages for the injuries received. The engineer testified that when 375 feet from the cattle guard he saw the head and shoulders of some one who was swinging his hat for the train to stop, and that he immediately did all he could to stop the train. The train consisted of five loaded and two empty freight cars equipped with air brakes. It was descending a grade of about 148 feet to the mile at a speed of five or six miles an hour. Two experts testified that under such circumstances the train should have been stopped within 50 to 200 feet from the place where the power was first applied.

Held, that the credibility of the experts was for the jury, since upon their testimony the engineer might be found negligent, and a nonsuit was error;

That the trial judge could not fairly pass upon the probability of the truth of the evidence until after the jury had considered the case. *Thayer v. New York Central & H. R. R. Co.*, 318.

5. *Injury to pedestrian at railroad crossing — freedom from contributory negligence — when plaintiff not employee.* The plaintiff was not a regular employee, but an extra brakeman, receiving compensation for each trip when called for service. The defendant maintained a Young Men's Christian Association, of which the membership was limited to its employees paying dues. The building also contained the train dispatcher's office, and was located across the tracks at the end of Seventy-second street, New York city. In order to reach the building it was necessary to descend a staircase leading down a retaining wall, and to cross the defendant's tracks to the building, this way having been commonly used for thirteen years. The plaintiff having been told that he might be called upon for duty that night, was on his way to the building. The night was dark, but clear. The evidence showed that he crossed a train on the first track, and looked in both directions, and upon taking two or three steps in advance was run down by the defendant's locomotive, which was backing without lights contrary to the company's rules.

Held, that the evidence warranted a finding that the plaintiff was free from contributory negligence;

That, at the time, the plaintiff was not an employee of the defendant in the sense that he assumed the risks of the situation, not being then employed, but going to enjoy the privileges of an association to which he paid dues;

That if the master's negligence be a matter extraneous to the servant's specific employment, or if the injury be received when the servant is not engaged in his duties, the servant occupies the status of a stranger;

That as the association building was maintained by the defendant as a waiting room for those who had relations with the company, and as the approach thereto across the tracks had been maintained for thirteen years to the knowledge of the defendant, and was the only practical method of reaching the building, the plaintiff was not a trespasser, and that it was incumbent upon the defendant to use reasonable care to avoid injury to persons lawfully using such crossing. *Best v. N. Y. C. & H. R. R. Co.*, 739.

6. *Collision between trolley car and wagon — erroneous nonsuit.* The plaintiff was injured by a collision between his wagon and the defendant's trolley car, while turning across the track into a side street. He testified that before he attempted to cross he looked in both directions and could see no car for a distance of from 500 to 600 feet, which was the limit of vision in the direction from which the car came. His horses were walking slowly, and the defendant's car came over the brow of a hill and struck the rear wheel of the wagon.

Held, that it was error to dismiss the complaint on the theory that the car must have been visible when the plaintiff attempted to cross the track, as a car going forty miles an hour could reach the plaintiff's wagon within the time taken to cross;

NEGLIGENCE — Continued.

That the plaintiff was not guilty of contributory negligence as a matter of law in attempting to cross when he saw no car approaching within 500 feet. *Heitz v. Yonkers Railroad Co.*, 746.

7. *Injury by stepping upon an electrically charged rail — erroneous charge.* In an action to recover damages for injuries received by the plaintiff, who stepped upon an electrically charged rail, when the defendant has given expert testimony that the shock could not be received except under certain conditions which did not exist, it is error for the court to instruct the jury that if the plaintiff received the shock he is entitled to recover, whether the defendant has exonerated itself or not. Such instruction is equivalent to holding that the defendant was an insurer, and that the sole question was whether the accident resulted from the shock. *Sullivan v. Brooklyn Heights R. R. Co.*, 784.

8. *Municipal corporations — notice — of prior injuries.* Although the fact of the happening or non-happening of previous accidents on an alleged defective sidewalk may bear upon the character of the defect and on the question of notice to the municipality, the fact that other persons escaped injury does not excuse the municipality from allowing the defect to continue. *Moroney v. City of New York*, 848.

9. *Same — injury to pedestrian on defective sidewalk.* Thus, where the plaintiff has shown that she suffered a fall and injury by reason of her toe catching in a hole under a flagstone which projected about two inches above the adjoining stone, and that said condition existed for more than a year, the question of the defendant's negligence should be submitted to the jury, although the plaintiff gives no proof of a prior accident, and the defendant's witnesses state that they had no knowledge of the defect.

Although the distance which one stone was raised above the other was not of itself negligence, yet, when there is a hole thereunder sufficiently large to catch and hold a foot, the question of negligence should be submitted to the jury. *Id.*

10. *Municipal corporations — fall of pedestrian on icy crosswalk.* When a pedestrian who is injured by a fall on the street complains only that there was ice on the crosswalk, and the case is tried upon that theory, and it is shown that her fall was caused by slipping off the sidewalk at the curb to the icy crosswalk, the slip on the sidewalk is the proximate cause of the injury and the case should not be given to the jury.

Moreover, when no defect or obstruction on the crosswalk is shown other than a temporary condition of ice and snow caused by the weather conditions, a municipality which worked diligently to remove the snow is not chargeable with negligence for failing to completely clear the street.

The rule is different where ice and snow have been allowed to accumulate at a particular spot for a considerable length of time until it becomes an obstruction and dangerous to pedestrians. *Brennan v. City of New York*, 849.

Municipal corporation — liability for injury to pedestrian from falling over a loose flagging lying upon a sidewalk which was being repaired — contributory negligence.

Brown v. City of New York, 901.

Injury to employee operating a gas engine — delegation of duty to give instruction.

See MASTER AND SERVANT, 1, 2.

Injury to workman by fall of temporary bridge — detail of work.

See MASTER AND SERVANT, 3.

Injury by planing machine.

See MASTER AND SERVANT, 4.

Injury by fall of hoist — *res ipsa loquitur*.

See MASTER AND SERVANT, 5-7.

When city liable for damages caused by dilapidated sewers.

See MUNICIPAL CORPORATION, 11.

Injury to pedestrian on incline leading from roadway to sidewalk.

See MUNICIPAL CORPORATION, 13.

NEGLIGENCE — *Continued.*

Injury caused by defective construction of building — reasonable care in erecting building.

See NUISANCE, 1-5.

Right to recovery on items for hospital expenses necessitated by injury not determined on motion to strike out allegations.

See PRACTICE, 5.

NEW TRIAL.

See TRIAL, generally.

NEW YORK, CITY OF.

Appeal from order of justice of Special Sessions sitting in Children's Court.

See APPEAL, 5.

Liability of municipality for unauthorized arrest at instigation of street cleaning department,

See ASSAULT AND BATTERY.

Revocation of license to sell milk in the city of New York without notice.

See CONSTITUTIONAL LAW.

Recovery of less than \$500 in Supreme Court.

See COSTS, 3.

Acquisition of piers by — compensation for "shedding license" taken.

See EMINENT DOMAIN, 6.

Taking lands for park purposes — when interest on award barred.

See EMINENT DOMAIN, 7.

Ratification of assignment of municipal franchise — right of electrical company to lay cables in subway.

See MUNICIPAL CORPORATION, 1-4.

Evidence insufficient to warrant dismissal of police officer.

See MUNICIPAL CORPORATION, 5, 6.

Proposals for contract for pumping engines — sufficient compliance with requirement that bidder give evidence of ability to perform — taxpayer's action restraining acceptance of bid.

See MUNICIPAL CORPORATION, 7, 8.

No power to grant right to build private railroad therein.

See MUNICIPAL CORPORATION, 9.

When clerk of board of education not entitled to salary during suspension.

See MUNICIPAL CORPORATION, 12.

NON-RESIDENT.

Right of defendant to security for costs when plaintiff is a non-resident.

See COSTS, 1.

Requiring security for costs of non-resident plaintiff is discretionary with court after service of answer.

See PRACTICE, 10.

Effect of prior order permitting suit as poor person upon order requiring non-resident to give security for costs.

See PRACTICE, 11.

NOTICE.

To municipal corporation of prior injury on defective sidewalk.

See NEGLIGENCE, 8.

Notice of trial excused when amendment conditioned on cause retaining place on the calendar.

See PRINCIPAL AND SURETY, 2.

Vendee not charged with notice of recorded deed under covenant that lands are free from certain restrictions.

See VENDOR AND PURCHASER, 1, 2.

NUISANCE.

1. *Injury caused by defective construction of building — liability of landlord for damage caused by condition of building.* Where the entire possession of a building has been surrendered to a lessee, the landlord is not liable during the lease for any injuries resulting from negligence through a failure to keep the building in repair, and in order to charge him it must be shown that the accident was the result of a condition which constituted a nuisance and which existed at the time the landlord surrendered the entire possession to the tenant or of which he afterward had actual notice. *Ugyla v. Brokaw*, 586.

2. *Pleading — facts setting out action for nuisance.* It is better for a pleading to characterize the nature of the action, but this is not imperatively required where the essential facts to support it are pleaded.

Hence, a complaint alleging that the plaintiff was injured while driving on a city street by the fall of building material from the top of a building upon the defendant's premises due to the fact that the roof was negligently and dangerously constructed; that the accident was occasioned by the carelessness of the defendant in failing to have the roof properly secured and that the defendant had knowledge and notice of this condition but refused and neglected to repair, authorizes a recovery on the theory of a nuisance, although nuisance is not expressly pleaded. *Id.*

3. *Reasonable care in erecting buildings of sufficient strength to withstand storms.* In erecting buildings near a public street reasonable care must be exercised to construct them so securely that they will withstand any storm which a reasonably prudent man familiar with local weather conditions would anticipate, but an owner is not an insurer against damage caused by a wind of hurricane velocity or by an earthquake.

Hence, since the evidence showed that the injury was caused by a heavy skylight being torn from its fastenings upon the roof by a wind, the velocity of which was between fifty and seventy-three miles per hour, and there was a conflict as to the sufficiency of the manner in which the skylight was attached, it was proper to submit to the jury the question as to whether the storm was of such unusual violence that the defendant in constructing the building was not required to guard against danger incident thereto.

As the jury was instructed that the defendant was not liable unless the skylight was improperly constructed and insecurely fastened to the building originally, it is immaterial that the trial judge did not expressly submit the case upon the theory of nuisance and that he made frequent reference to negligence. *Id.*

4. *Liability where tenant erected building.* A landlord cannot escape liability for damage resulting from a nuisance which existed at the time the building was constructed on the ground that the building was erected by his tenant, especially where the landlord reserved partial control as to the plan and construction thereof. *Id.*

A *prima facie* case against the owner of real property is made out by proof of the existence of a nuisance and either that it was created in whole or in part by the owner or existed in such manner that he was chargeable presumptively with knowledge thereof. *Id.*

5. *Error in charge as to burden of proof.* Hence, it is reversible error to charge that the fall of the skylight created a presumption that it was not properly secured which the defendant must meet by contrary proof. The doctrine *res ipsa loquitur* would not establish even *prima facie* that the building was a nuisance when constructed. *Id.*

6. *Pur'y — village may sue to enforce order of board of health.* A suit to enjoin the violation of an order of a village board of health to abate a nuisance and to enforce the same is properly brought in the name of the village instead of that of the board of health. *Village of White Plains v. Tarrytown, W. P. & M. R. Co.*, 841.

7. *Same — pleading — when complaint insufficient.* But in such action it is not enough to allege and prove that the board of health declared a nuisance and ordered it abated; the complaint must allege facts showing the nuisance, and the resolution and order of the board of health are not evidence thereof. A complaint failing to state such facts is demurrable. *Id.*

OFFICER.

Rights of *de facto* officers.

See ELECTION LAW, 2.

When clerk of board of education not entitled to salary during suspension.

See MUNICIPAL CORPORATION, 12.

PARENT AND CHILD.

1. *Habeas corpus to deprive parent of custody of daughter.* When a son applies for a writ of habeas corpus to deprive his father of the custody of a daughter, who is alleged to be illegally restrained of her liberty and kept in a house where the father is alleged to be living in adultery, and on the return of the writ the daughter makes an affidavit that she is over eighteen years of age and has a happy home and is receiving an excellent education and desires to live with her father, and that her other relatives are almost strangers to her and not congenial, and that she is not restrained of her liberty, and the charges against the father are unsupported by the evidence, the writ should be dismissed. *People ex rel. Bishop v. Bishop*, 445.

2. *Same — effect of daughter's marriage.* In any event, the marriage of the daughter prior to the confirmation of a report granting the writ disposes of any question as to the daughter's custody, and the court is without power to make a *nunc pro tunc* order depriving the father of her custody. *Id.*

3. *Will providing for support of minor — income applied when father unable to support infant.* When a will creates a trust for the maintenance and support of an infant during his minority, accumulations and principal to be paid over on his arriving at majority, the trustees may be ordered to apply such portion of the income as is necessary to the support and maintenance of the infant, if the father has not sufficient financial ability to properly care for him. *Susens v. Daiker*, 668.

PARTITION.

Presumption of payment of mortgage after twenty years — when title marketable.

See VENDOR AND PURCHASER, 6, 7.

PARTNERSHIP.

1. *Executors and administrators — when surviving partner should not be removed as executor.* When the will of a deceased partner gives to a surviving partner, who is also made executrix and trustee, the controlling interest in the business and management thereof, free from any control or dictation from any person whomsoever, the surviving partner is the sole legal owner of the assets and has exclusive right of management in winding up the partnership affairs within the limits of good faith.

The other representatives of the deceased partner have no right to interfere with the surviving partner, or to require her removal as executrix and trustee, so long as she is applying the proceeds of the firm in settlement of its debts.

The representative of the deceased partner may require the application of the assets in payment of debts, but the mode and manner of so doing is under the exclusive control of the surviving partner. *Matter of Thieriot*, 686.

2. *To deal in lands — Statute of Frauds — contract of partner to convey must be in writing.* Although a partnership to deal in real estate may be created by parol, if such agreement also provides for the conveyance of real property from one partner to another or to the copartnership, it comes within the Statute of Frauds and is not enforceable if not in writing. *Pounds v. Egbert*, 756.

3. *Same — specific performance refused.* Thus, if an alleged parol agreement for the formation of a partnership to deal in lands further provided that certain lands standing in the name of the wife of one of the partners as trustee for her husband should be conveyed to the other partner upon his paying his share of the purchase price, specific performance of the oral contract is unenforceable whether it were part of the partnership agreement or collateral thereto.

Part payment of a consideration by one of the partners, or work, labor and services in the care, management and improvement of the property are not sufficient for a decree of specific performance, as the remedy at law is adequate. *Id.*

Liability of insolvent partner for judgment on partnership debt discharged by individual bankruptcy.

See BANKRUPTCY.

PARTY.

1. *When lessee of elevated railroad may be brought in to defend action for injunction.* When a plaintiff sues to enjoin the defendant from operating an elevated railroad and for the damage to the plaintiff's premises caused thereby, and subsequent to the action the defendant leased its road to another company, a motion for leave to serve a supplemental summons bringing in the lessee should not be denied. This is true even though the plaintiff has served summons in another action against the lessee, if it appears that the lessee threatened to construct another track in front of the plaintiff's premises.

Although the lessee is not liable for damages caused by the lessor unless it assume and agree to pay the same, nevertheless when a plaintiff is entitled to injunctive relief against the lessor, the lessee is a necessary party defendant. *Furley v. Manhattan Railway Co.*, 248.

2. *Practice — defendant brought in by supplemental summons.* When such lessee is brought in as a party defendant it should be done by a supplemental summons and complaint. *Id.*

3. *Joinder of plaintiffs by consent — motion by one plaintiff to bring in new defendant.* When in a stockholder's action against the directors of a bank for malfeasance, a plaintiff has been brought in by consent of the parties, the intervening plaintiff is entitled to the same rights and privileges as the original plaintiff. Hence, when the intervening plaintiff moves to bring in a new defendant, which motion is opposed by the original plaintiff, the court in its discretion may decide between the conflicting interests of the coplaintiffs and bring in the defendant, if he is a proper party. *Weed v. First National Bank*, 340.

4. *Same — protection of coplaintiff against costs.* But under such circumstances the plaintiff who objects should be secured against costs if the defendant brought in be successful, and the moving party should be required to give a bond to indemnify him. *Id.*

Liquidating committee of corporation may defend suit as officers thereof.
See CORPORATION, 2.

When trustee who has participated in illegal transfer of property may bring action to rescind the same.

See EXECUTOR AND ADMINISTRATOR.

Village may sue to enforce order of board of health.

See NUISANCE, 6.

Complaint against several defendants asking alternative relief.

See PLEADING, 3.

PENAL CODE.

[For table containing all sections cited and construed in this volume see *ante*, p. 1x.]

PENALTY.

On refusal of gas company to supply gas because of failure of former occupant to pay.

See GAS AND ELECTRICITY.

PERSONAL PROPERTY.

When absolute ownership not suspended.

See WILL, 6.

Sale of.

See SALE.

PHYSICIAN.

Practicing "mechano neural therapy."

See CRIME, 12.

Basis for expert testimony as to sanity.

See EVIDENCE, 3.

Opinion as to permanency of injury not based upon facts.

See EVIDENCE, 4.

PLEADING.

1. *Improper joinder of actions to recover value of legal services rendered to several defendants.* When plaintiffs allege that they rendered services as attorneys and counselors at law in and about the formation and organization of a corporation to take over the business of several firms manufacturing in a certain line of business, and allege that they were retained by members of various separate firms who desired to become parties to the corporation, the actions upon the several and separate contracts of employment cannot be joined in one complaint.

In order that several causes of action may be united it must appear upon the face of the complaint that the causes so united affect all the parties to the action, except as otherwise prescribed by law.

When the severance of such causes of action is required the plaintiff will be granted leave to amend on payment of costs. *Myers v. Leerer*, 27.

2. *Actions for assault and slander cannot be united.* A complaint alleging that the plaintiff was assaulted by the defendant's servants, who then and there falsely spoke concerning the plaintiff scandalous and defamatory words and that by reason of the assault the plaintiff was made sick, etc., and that by reason of the slanderous words was greatly injured, all to her damage, etc., improperly unites causes of action for assault and slander.

A motion to compel the plaintiff to separately state and number such causes of action should be granted.

It seems, however, that said actions cannot be united in one complaint, not being actions arising out of the same transaction within the meaning of the statute. *Paul v. Ford*, 151.

3. *Complaint against several defendants asking alternative relief.* Neither at common law nor under the Code of Civil Procedure can a plaintiff join two defendants upon the theory that he has a right to relief against one or the other of them.

If, however, the complaint alleges facts which show that he is entitled to relief legal or equitable, against one of the defendants joined, the complaint will be sustained as against him.

But when a complaint against two defendants asking alternative relief does not state a cause of action against either the complaint should be dismissed. *Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co.*, 215.

4. *Same—tender.* While tender may not be a prerequisite to an action in equity, yet, where a party entitled to an assignment or conveyance of property upon the payment of money goes into court to enforce that right, the complaint must make an offer to pay the amount. *Id.*

5. *Same—failure to state cause of action against either defendant.* A complaint alleged in substance that the plaintiff having a contract to purchase lands assigned the same to a defendant corporation, which paid the plaintiff a part of a bonus therefor under an agreement whereby, if the assignee should fail to acquire title without fault on its part, the contract should be reassigned and the bonus repaid by the plaintiff. The assignee did not acquire title to the property, and the plaintiff joined the assignee and the vendor as parties defendant, asking as alternative relief: (1) That the marketability of the title be adjudged and whether the failure of the assignee to take title was its fault. (2) That if the title be marketable and the assignee in fault that the vendor and assignee be decreed to perform and the assignee be adjudged liable for the balance of the bonus. (3) That if the title be unmarketable the assignment and contract of sale be canceled, etc.

No facts were alleged showing that the failure of the assignee to take title was due to its fault, and there was no demand for a reassignment or offer to pay the portion of the bonus received.

Held, that the complaint failed to state a cause of action against either defendant;

That the plaintiff could not have the benefit of an allegation by the assignee that the vendor could not convey a marketable title, which allegation was denied by the plaintiff's reply.

A plaintiff cannot sustain a cause of action upon an allegation in the answer of a defendant, which he specifically denies by reply. *Id.*

6. *When complaint against attorney is on contract rather than in conversion—counterclaim for sums due on other contracts.* It appeared that the plaintiff's testator on going abroad had given a sum of money to his attorney to make pay-

PLEADING — *Continued.*

ments on claims and liens against the testator's property, then in litigation. On the testator's return he left the balance of the money in the defendant's hands without making a demand therefor.

The plaintiffs, as executors, demanded the return of the money by the defendant, and in a complaint alleged that the defendant wrongfully and unlawfully refused to turn over and pay to the plaintiffs the said amount in his hands and "converted the same to his own use."

Held, that the complaint did not set out an action for conversion, but one for money had and received, and that, therefore, the defendant was entitled to set up counterclaims for sums due on other contracts. *Lange v. Schile*, 233.

7. *Second motion to amend complaint* — *leave of court necessary* — *when granted* — *rule as to renewal of motion*. When a motion to amend a complaint by adding a party defendant has been denied without leave to renew the motion, a second motion brought without leave will be denied.

When, however, it appears that the defendant as administrator of a deceased partner, did not demur to the first complaint because of a failure to join the surviving partner as party defendant, but does demur to an amended complaint on the ground of defect of parties, the court should grant a further amendment bringing in the surviving partner as a defendant. *Haskell v. Moran*, 251.

8. A decision on a motion is not *res adjudicata* to the same extent as a judgment.

Except in cases of provisional remedies, where special provisions of the Code of Civil Procedure authorize a motion to vacate on the moving papers and a subsequent motion for the same relief on new affidavits showing facts previously existing, a motion once made on notice and denied may not be renewed either on the same papers or upon additional facts existing at the time the prior motion was made, without leave of court. But a motion based upon facts subsequently arising or upon the ground that the former order was obtained by fraud or collusion may be made as a matter of right without leave of court. *Id.*

9. *Amendment of answer to ask reformation of contract*. When in an action there is a dispute as to the meaning of a contract involved, the defendant should be allowed to amend the answer so as to ask a reformation of the contract conforming it to the intention of the parties.

When the effect of the granting of such amendment will be to take the case from the calendar and delay the trial, the amendment should be conditioned upon the payment of all costs to date. *Nat. Gum & Mica Co. v. Century Paint & W. P. Co.*, 267.

10. *Bill of particulars* — *counterclaim charging real estate agent with making personal profit* — *particulars of counterclaim required*. The plaintiff, an attorney at law, sued as assignee of a deceased attorney to recover moneys expended for the benefit of the client's real estate. As a counterclaim the defendants alleged that the plaintiff and his assignor were copartners and rendered services as agents in leasing real estate and collecting the rents, and that without authority had equipped portions of the realty with furniture and leased the same, and personally appropriated that portion of the rent coming from the lease of the furniture, etc. The plaintiff denied all knowledge of the matters alleged in said counterclaim and asked a bill of particulars thereof.

Held, that a bill of particulars should be required. *Washburn v. Graves*, 3-3

11. *Complaint stating action on contract and for conversion* — *proof of action on contract warrants recovery*. Where a complaint contains a statement of facts constituting an action upon contract which is sustained by proof at trial, a recovery is authorized although the complaint also contains allegations of tort.

Thus when the complaint sets out a contract of employment and a breach thereof by the defendant, and also that the defendant, as a contractor, was to receive compensation under his contract and to pay labor from the proceeds and that the defendant refused and neglected to pay the plaintiff from the funds received but wrongfully converted and disposed of such funds to his own use, the plaintiff upon establishing the facts supporting the action for breach of contract is entitled to recover, even though there be insufficient proof of the allegations of conversion. *Connor v. Philo*, 349.

12. *Code Civil Procedure, section 549, subdivision 4, construed*. Subdivision 4 of section 549 of the Code of Civil Procedure, providing when in an action upon contract the complaint alleges fraud, the plaintiff cannot recover unless he prove

PLEADING—*Continued.*

the fraud on trial, does not apply to actions in Justices' Courts but relates only to actions in the Supreme Court, the City Court of the city of New York or to a County Court. *Id.*

13. *Allegation of performance of conditions precedent under section 533 of the Code of Civil Procedure—complaint against surety.* In alleging the performance of a condition precedent in a contract under section 533 of the Code of Civil Procedure, while it is not necessary to state the facts constituting the performance, yet the plaintiff must allege that he has *duly* performed all the conditions precedent on his part to be performed; a mere allegation of general performance is insufficient. Thus, a plaintiff suing to recover on a bond guaranteeing the payment of a loan who merely alleges that every condition was fulfilled and all things happened and all times elapsed necessary to enable the plaintiff to maintain this action for recovery on the foot of said bond, etc., does not state the performance of conditions precedent under said section.

However, when such complaint alleges that a borrower duly executed and delivered to the plaintiff for value received his promissory note by which he promised to pay the plaintiff \$5,000 at a time stated and that it was to secure the payment of this loan that the bond in question was given, the complaint states a good cause of action and is not defective in failing to show that the plaintiff loaned the money secured by the bond. The allegation that that note was duly executed and delivered for value received, etc., and that the borrower wholly failed to discharge "the said indebtedness of \$5,000" sufficiently alleges that the amount was loaned. *Gansevoort Bank v. Empire State Surety Co.*, 455.

14. *Practice—action for conversion and for goods sold—causes should be separately stated and numbered.* When a complaint alleges two causes of action, one for conversion and the other for goods sold and delivered, the defendant is entitled to have the causes separately stated and numbered.

Although the defendant may require the plaintiff to elect between such causes at trial, he may at his option require the causes to be separated and numbered before answering. *Christenson v. Pineus*, 810.

15. *Defense of lack of jurisdiction dependent upon facts must be taken by answer.* Lack of jurisdiction depending upon a question of fact, such as the non-residence of the plaintiff, must be pleaded as a defense, or else evidence thereof may be excluded.

Hence, when a plaintiff has unnecessarily alleged her residence in the complaint, a foreign defendant cannot raise the issue by a general denial, for a denial does not raise issues on immaterial allegations of the complaint. *Uhart v. Baltimore & Ohio Railroad Co.*, 831.

16. *Same—when denials on information and belief insufficient.* Moreover, an answer which "on information and belief" denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the complaint is not good as a denial. *Id.*

17. *When causes should be separately stated.* A complaint for sums due the plaintiff on a breach of contract of service and for damages caused by the breach sets out two causes of action, which should be separately stated. *Carlson v. Albert*, 836.

18. *Improper joinder of actions on contract and in tort.* A cause of action for damages for the breach of a contract and a cause of action for damages for fraud in inducing the plaintiff to make it are inconsistent with each other and cannot be united in the same complaint under subdivision 9 of section 484 of the Code of Civil Procedure. An election between such inconsistent causes is required. *Edison Electric Illuminating Co. v. Kulbfleisch Co.*, 842.

Accounting—allegations by executors sued for an accounting that the surviving trustee, to whom they must turn over certain funds, is incompetent are not irrelevant because they reflect upon the character of such trustee.

Hall v. Strong, 912.

Failure of defense to raise issue of fact.

See BANKING.

PLEADING — *Continued.*

When action by holder of note not barred by allegation of a prior action by third party thereon — failure of consideration in collateral transaction no defense — failure to repeat denials in each separate defense.

See **BILLS AND NOTES**, 1-3.

When defense of usury not available against State bank.

See **BILLS AND NOTES**, 6.

Defense that promissory note was transferred "after maturity and payment."

See **BILLS AND NOTES**, 7.

Principal may not counterclaim debt due from agent in action by third person to recover for tort of agent.

See **CONTRACT**, 10.

Failure of complaint to allege performance or consideration.

See **CONTRACT**, 13.

Faithful performance of existing obligations alleged as consideration for a new promise.

See **CONTRACT**, 17.

Complaint alleging bad faith by reorganization committee which warrants accounting.

See **CORPORATION**, 3.

Facts which do not show transfer of personality in fraud of creditors.

See **DEBTOR AND CREDITOR**, 3.

Complaint need not allege written agreement.

See **DISCOVERY**, 1.

Payment is an affirmative defense.

See **EVIDENCE**, 12.

Defense of Statute of Limitations in action to charge a joint debtor not personally served in a prior action.

See **JUDGMENT**, 2.

Partial defense not so pleaded is demurrable — allegation that article was published of and concerning the plaintiff.

See **LIBEL**, 1, 2.

When complaint must show actionable meaning by words of innuendo.

See **LIBEL**, 4.

When right to peremptory writ considered without issuing alternative writ — insufficient denial.

See **MANDAMUS**.

Facts setting out action for nuisance.

See **NUISANCE**, 2.

Complaint of village in action to abate nuisance must allege facts showing nuisance.

See **NUISANCE**, 7.

Damages in action on promissory note — answer alleging conversion of collateral must also allege damages.

See **PRACTICE**, 4.

Defense arising after service of answer.

See **PRACTICE**, 6.

Acceptance of unverified amended answer to unverified amended complaint compelled.

See **PRACTICE**, 12.

When leave to amend petition asking probate of will should be granted.

See **PRACTICE**, 15, 16.

Right to confine amended complaint to one cause of action after order compelling an amendment separately stating actions.

See **PRACTICE**, 17.

POLICE.

Evidence insufficient to warrant dismissal of police officer.

See MUNICIPAL CORPORATION, 5, 6.

PRACTICE.

1. *When Appellate Division may direct judgment for plaintiff on special verdict.* Where the court has taken a special verdict which is rendered in favor of the plaintiff and then dismisses the complaint, and there are no exceptions taken by the defendant which would justify the Appellate Division in ordering a new trial, the Appellate Division on reversing the order dismissing the complaint should direct judgment for the plaintiff on the special verdict. *Nicholls v. American Steel & Wire Co.*, 21.

2. *When case on appeal should contain grounds of motion to dismiss the complaint.* When at trial the plaintiff moves for the direction of a verdict and the defendant moves for the dismissal of the complaint, and in the alternative for a direction of verdict for plaintiff for nominal damages and the court directs judgment for the plaintiff, the case on appeal should state the grounds upon which the defendant moved to dismiss the complaint and for the direction of a verdict, so that there can be no question that he waived any position which he was entitled to take. *Blewett v. Hoyt*, 32.

3. *Failure to serve printed papers on appeal — opening default.* The preparation, settlement and filing of a case or bill of exceptions is part of the record of the court below and the opening of a default in these respects is with the Special Term. But after the case is settled and filed, the filing and service of the printed papers upon which an appeal is heard are part of the appeal and the opening of any default therein lies with the Appellate Division. *Hansen v. Walsh*, 39.

4. *When judgment by default not opened — failure of proposed answer to allege defense.* When the liquidating committee of a corporation seeks to open a judgment taken by default, its answer must state a defense. When the action was brought upon a promissory note secured by collateral, it is no defense to allege that the holder of the note converted the collateral, if it be not set out as a set-off or counterclaim that the collateral was of value or that the defendants have sustained damage. *Wills v. Rowland & Co.*, 122.

5. *Right to damage not determined on motion to strike out allegations of complaint.* When a question arises as to whether a pleading states a cause of action or defense, the issue must be presented by demurrer, or upon trial at the opening thereof, or when the evidence is offered, or at the close of the case by motion. Especially is this true as to the measure or items of damage.

Thus, when the complaint in an action to recover damages for death by wrongful act alleges that the widow of the deceased spent large sums of money for hospital room and board and for care and medical attendance, the right to recover such items cannot be decided upon a motion to strike the allegations from the complaint. *Fox v. Chapman*, 127.

6. *Defense arising after service of answer.* A defense arising after the service of the answer can only be interposed by leave of court and should be in the form of a supplemental answer. Such defense cannot be set up by an amendment as of course. *Galm v. Sullivan*, 235.

7. *Undertaking on appeal from Surrogate's Court — no exception to sureties after approval by surrogate.* An undertaking given under sections 2577 and 2581 of the Code of Civil Procedure on an appeal to the Appellate Division from a decree or order of the surrogate is not governed by section 1835 of the Code of Civil Procedure providing for the justification of sureties. Such latter section relates only to appeals to the Court of Appeals and is not applicable to the Surrogate's Court. Hence, when such undertaking has been filed with the surrogate and has been allowed and approved by him, an exception to the sureties is not well taken, and a motion to perfect an appeal under section 1303 of the Code of Civil Procedure will be dismissed.

The remedy, if sureties are insufficient or become insolvent, is to apply for an order requiring a new bond or undertaking or additional securities as the case may require. *Mutter of Sheldon*, 357.

8. *Same — discretion of surrogate.* It is within the discretion of the surrogate whether he will determine the sufficiency of sureties from their affidavits of justification or will require the sureties to attend and be examined before

PRACTICE — *Continued.*

approving the undertaking. He may establish rules to regulate the justification of sureties in his own court. *Id.*

9. *Same* — *power of Appellate Division to perfect appeal.* The Appellate Division has power to permit an appellant from the Surrogate's Court to file a new undertaking or do any other act necessary to perfect an appeal. *Id.*

10. *Security for costs by foreign plaintiff* — *granting security in discretion of court after service of answer.* A defendant waives his absolute right to require a non resident plaintiff to give security for costs unless the motion therefor be made before answer. After the defendant has answered the granting of security for costs is in the discretion of the court, and the burden is on the defendant to excuse his failure to apply for security before answer.

Vague and general allegations of pressing and important business of defendant's attorney do not show an adequate excuse. *Fabrik Schiller's'er Verschlu-se v. Nease*, 379.

11. *Security for costs* — *prior order permitting plaintiff to sue as poor person.* An order requiring a non-resident plaintiff to give security for costs should be vacated on motion where it is shown that an order permitting the plaintiff to sue as a poor person had been granted before the commencement of the action. The order permitting suit as a poor person can only be vacated upon a motion regularly made for that purpose, and is not invalidated by the failure of the plaintiff to serve a copy thereof upon the defendant. *Buccolo v. New York Life Insurance Co.*, 428.

12. *Amended answer to amended complaint* — *acceptance of service ordered.* A verified complaint was served to which the defendants interposed a verified answer and within twenty days thereafter amended the answer. Thereupon the plaintiff served an unverified amended complaint to which the defendants served an unverified answer and within twenty days thereafter served an unverified amended answer which the plaintiff refused to receive. On motion to compel the acceptance of the last amended answer,

Held, that the plaintiff should be required to accept the answer;

That as the plaintiff's amended complaint was unverified a verified answer was not required, for an amended pleading takes the place of the original pleading and the action proceeds as if the original pleading had never been served;

That the defendants by serving an amended answer to the original complaint had not exhausted their right to amend their second answer as of course under section 542 of the Code of Civil Procedure within twenty days because the plaintiff had served an amended complaint. *Brooks Brothers v. Tiffany*, 470.

13. *Preference of infant.* According to the provision of section 793 of the Code of Civil Procedure a motion to place a cause upon the preferred calendar in the county of New York must be made at the commencement of the term for which notice of trial is served. *Meyerson v. Levy*, 475.

14. *Same* — *waiver of preference by default on motion therefor.* If a party entitled to such preference and having served notice of trial and notice of motion for a preference upon the ground that the plaintiff is an infant make default on the return day, the right to a preference is lost.

Such default is not excused because the party had failed to file a note of issue for the term for which he had noticed the trial, for in any event he should have appeared and withdrawn the motion rather than let it be dismissed.

When the right to a preference has been once waived as aforesaid a subsequent notice of trial for another term is futile either to avoid the effect of the waiver or to support a new application.

In the county of New York, where a large number of causes are upon the calendar, the practice with respect to preferences must be strictly followed. *Id.*

15. *Pleading* — *amendment of.* The modern tendency is to afford litigants every reasonable opportunity, if seasonable application be made, to put their pleading in such form as they consider will best present their contention as to the question at issue. This practice tends to promote the ends of justice and to prevent technical and inadvertent errors. *Mutter of Rubens*, 523.

16. *Surrogate's Court* — *when leave to amend petition asking probate of will should be granted.* Hence, if a petition for a probate of a will alleges that the deceased was a resident of France and died leaving assets in this State, and the probate

PRACTICE — *Continued.*

is contested upon the ground that the will was not executed according to the laws of France, the petitioner should be allowed to amend his petition to allege that the testator was a resident of this State temporarily residing abroad. *Id.*

17. *Order that plaintiff amend complaint separately stating actions — right to restrict amended complaint to one cause.* When the plaintiff has served a complaint containing more than one cause of action and an order has been granted requiring the service of an amended complaint separately stating and numbering the alleged causes of action, the order does not mean that the plaintiff *volens volens* must serve a complaint containing two causes of action. The order is complied with if the plaintiff serve an amended complaint setting up but one cause of action, and the defendant will be ordered to accept service thereof. *O'Reilly v. Shelly* (No. 1), 559.

18. *When service of complaint after defendant's default should not be required — default should be opened only on terms.* Action was commenced by personal service of summons and the defendant neither appeared nor answered until more than two months after the time to answer had expired, when he served notice of appearance demanding a copy of the complaint. Service of the complaint was refused, but notice of appearance was retained by the plaintiff's attorney. The neglect to appear and answer was not excused.

Held, that it was error to dismiss the action, with costs, unless the complaint be served within five days;

That if the order requiring the service of the complaint were regarded as an opening of the default, the defendant was required to excuse the same, and in any event the relief could only be granted on terms. *Shenstone v. Wilson*, 752.

19. *Tax — appeal from order of surrogate exempting estate from taxation.* The review of a surrogate's order exempting an estate from taxation without the appointment of an appraiser should be taken first by an appeal to the surrogate and then by appeal to the Appellate Division from the affirmance or reversal by the surrogate of his order. The original order of the surrogate being in the nature of an *ex parte* order, no direct appeal therefrom lies to the Appellate Division. *Matter of Costello* (Nos. 1, 2), 807.

20. *Evidence — when representative capacity of defendant admitted by pleading — practice — when adjournment should be granted to allow production of documentary evidence.* The plaintiff had brought a prior action in which personal property in the possession of defendant Pfeiffer was attached. The defendant's mother claimed to be the owner and secured possession of the property by filing a bond under section 85 of the Municipal Court Act of the city of New York. Thereafter she died and the defendant Pfeiffer was appointed her executor. In an action against him as executor and the surety company on the bond, the plaintiff alleged the death of the mother and the granting of letters testamentary to the defendant Pfeiffer, which allegation was not denied by him.

Held, that it was error to dismiss the complaint as against the executor on the theory that his representative capacity was not proved, for as to him the fact was admitted by the record;

That as to the defendant surety company it was an abuse of discretion to refuse a short adjournment to enable the plaintiff to make proper proof of the probate of the will and the issuance of letters testamentary as an objection to oral evidence thereof took the plaintiff by surprise. *Reiss v. Pfeiffer*, 880.

When habeas corpus not proper remedy to contest jurisdiction of criminal court.

See COURT, 4.

Only one judgment authorized upon several demurrers.

See DEBTOR AND CREDITOR, 3.

Commission upon interrogatories must state to whom issued.

See DEPOSITION.

Inspection of books and papers before trial.

See DISCOVERY.

Defective record of judgment of foreign court corrected on appeal.

See EVIDENCE, 7.

PRACTICE — Continued.

Nature of proceedings for commitment — relief to unsuccessful petitioner charged with costs.

See INCOMPETENT PERSON.

When denial of preliminary injunction reviewed on appeal.

See INJUNCTION, 1.

Peremptory writ denied where answer raises question of fact as to selling of liquor on Sunday.

See INTOXICATING LIQUORS, 4.

Defense of Statute of Limitations in action to charge a joint debtor not personally served in a prior action — amendment at trial.

See JUDGMENT, 1, 2.

Default on substituted service not opened where defendant's attorney admits receipt of summons — defendant let in to defend excessive damages.

See JUDGMENT, 3, 4.

When right to peremptory writ considered without issuing alternative writ.

See MANDAMUS.

Supplemental summons to bring in lessee of an elevated railroad to defend injunction.

See PARTY, 1.

Right of intervening plaintiff to move to bring in a new defendant — protection of coplaintiff against costs.

See PARTY, 3, 4.

Improper joinder of actions to recover value of legal services against several defendants.

See PLEADING, 1.

Actions for assault and slander cannot be united.

See PLEADING, 2.

Leave of court necessary on second motion to amend complaint.

See PLEADING, 7, 8.

Amendment of answer to ask reformation of contract conditioned upon payment of costs to date.

See PLEADING, 9.

When findings and conclusions need not be separately stated.

See REFERENCE, 3.

When costs not authorized upon recovery of amount defendant had tendered before trial.

See TRIAL, 4.

When court will remove trustee appointed by will.

See TRUST, 4.

In regard to change of venue.

See VENUE.

See APPEAL, generally.

See CALENDAR, generally.

See PLEADING, generally.

PRIMARY ELECTION.

See ELECTION LAW, 3-5.

PRINCIPAL AND AGENT.

Claims by various brokers to commissions. A firm of real estate brokers, L. & Z., called the attention of a firm, M. & S., to real estate owned by one Barnet Shapiro. M. & S. in attempting to call Shapiro on the telephone were put into communication with a broker also named Barnet Shapiro, who replied that he knew about the houses and made an appointment with M. & S. to bring them and the real owner Shapiro into personal communication. The owner finally sold to M. & S., who first informed the owner that they were purchasers and not brokers, but at the time of the sale admitted that they were brokers representing one B. to whom the lands were sold. The owner being beset by the claims of the three brokers for commissions paid the amount into court.

PRINCIPAL AND AGENT — Continued.

On the issue as to which of the brokers was entitled to the commission, *Held*, that it was not error to exclude the claim of the broker Shapiro, for it did not appear that the buyer B. was induced by him to apply to the seller;

That it was error to exclude the claim of the brokers M. & S. on the theory that they were not employed as agents prior to making the sale to B., such proof not being essential;

That judgment awarding the commissions to L. & Z. should be reversed and a new trial granted. *Shapiro v. Shapiro*, 817.

Ratifications of acts of insurance agent.

Boutwell v. Globe & Rutgers Fire Insurance Co., 904.

Inspection of papers in attorney's possession — attorney acting as business agent not privileged.

See ATTORNEY AND CLIENT, 7.

Facts showing agency of stockbroker — agent as joint tortfeasor with principal — settlement by agent.

See CONTRACT, 8-10.

Broker's agreement to release vendor from payment of commissions as consideration for vendee's promise to pay moneys.

See CONTRACT, 16.

When agency of vendor of grouse question for jury.

See FOREST, FISH AND GAME LAW, 2.

Failure to charge that principal was chargeable with agent's knowledge.

See NEGLIGENCE, 3.

Bill of particulars of counterclaim charging real estate agent with making a personal profit.

See PLEADING, 10.

Principal not chargeable with knowledge of agent acquired prior to agency — evidence of agency.

See SALE, 4.

Payment of installment to agent contrary to contract.

See VENDOR AND PURCHASER, 9.

PRINCIPAL AND INTEREST.

See INTEREST.

PRINCIPAL AND SURETY.

1. *Evidence — good faith of municipality in settling action — when prior statements of principal to city authorities inadmissible.* A municipal contract required the contractor to indemnify the city against damages to person or property caused by his negligence. Before the trial of an action against the city and the contractor for personal injuries the contractor, having finished the work and desiring to be paid gave the city a bond of indemnity for \$10,000 to secure it against any judgment that might be obtained in the action. The plaintiff in that action recovered \$22,000, and pending an appeal by the city and the contractor the former settled with the plaintiff at a sum \$5,000 less than the judgment. In an action by the city against the contractor and the surety on his bond,

Held, that as there was evidence by the corporation counsel that he was of the opinion that the plaintiff was entitled to recover and that a new trial might result more unfavorably to the city and there being no evidence of bad faith on the part of the city in making settlement, a finding that the city acted in good faith was sustained by the evidence;

That statements made by the contractor to the city comptroller at the time the bond was given and two years prior to the settlement by the city that the contractor wished to carry the case to the appellate court were properly excluded, being too remote on the question of good faith on the part of the city authorities. *City of New York v. Baird*, 659.

2. *Undertaking that principal deposit moneys — liability of surety — interest — practice — amendment conditioned on cause retaining place on the calendar — when notice of trial not necessary.* One J secured a judgment against M. as president of an association. In proceedings supplementary to execution the judgment creditor had discovered moneys which had been applied upon the execution. A

PRINCIPAL AND SURETY — *Continued.*

motion by M. to set aside the judgment was denied, and thereafter M. was allowed to perfect his appeal from such denial and the order required J. to make restitution of the sum obtained in supplementary proceedings by depositing it in a bank to the credit of M.'s association. Before the trial J. gave an undertaking (on which the present defendant was surety), providing that if the order of restitution were affirmed J. would pay the sum directed by the judgment. In an action against the surety based upon the fact that restitution had never been made,

Held, that the defendant guaranteed that the restitution should be made by a deposit of the sum in a bank to the credit of M.'s association, which was all that could be required in the present action;

That the principal of the surety in the suit was entitled to a strict construction of the undertaking and to the redeposit of the money;

That as the surety had only undertaken that J. should deposit the money, M. was not entitled to a judgment that the sum be paid to him outright as president of the association;

That the court had power to require said restitution;

That interest is properly charged against the surety from the time its liability became determined;

That when a surety defends a suit brought to compel the fulfillment of its undertaking it is chargeable with costs.

The Special Term in allowing an amendment to a complaint may require that the amendment be without prejudice to the position of the cause on the trial calendar and a subsequent notice of trial need not be served by the plaintiff. *Mossein v. Empire State Surety Co.*, 820.

Allegation of performance of conditions precedent under section 533 of the Code of Civil Procedure in complaint against surety.

See PLEADING, 13.

PROCESS.

1. *When jurisdiction of foreign corporation not obtained by service of summons on president.* A foreign corporation not doing business in this State and having no property here and which has not appointed an agent upon whom service can be made, cannot be brought into court in a stockholder's action to obtain a decree adjudging the corporation to be owner of certain mines by service of summons upon its president who did not come into this State as representative of the company. *Grant v. Cananea Consolidated Copper Co.*, 576.

2. *Conflict of laws — when Federal decisions controlling.* Although the contrary was heretofore held by the Court of Appeals, a Federal question is involved under the 14th amendment of the United States Constitution, and hence the Federal rule must be followed even though in direct opposition to the decisions of the Court of Appeals which would otherwise be controlling. *Id.*

3. *Same — special appearance to contest jurisdiction.* The defendant may invoke the Federal rule by a special appearance in the action made solely for the purpose of moving to set aside the service of summons. *Id.*

When attorney's client may be served by substitution in action to enforce lien.

See ATTORNEY AND CLIENT, 4.

Default on substituted service not opened where defendant's attorney admits receipt of summons

See JUDGMENT, 3.

Supplemental summons to bring in lessee of an elevated railroad to defend injunction.

See PARTY, 1.

Acceptance of unverified amended answer to unverified amended complaint compelled.

See PRACTICE, 12.

When service of complaint not required after default — default opened on terms.

See PRACTICE, 18.

RAILROAD.

Damages to abutting owners by construction of underground railway—counsel fees and necessary expenses allowed.

See EMINENT DOMAIN, 1.

When lessee of railroad may enjoin unlawful appropriation of street by a State contractor.

See EMINENT DOMAIN, 4.

No power to grant right to build private railroad in city of New York.

See MUNICIPAL CORPORATION, 9.

Injury to motorman by "plow" of car catching in slot rail.

See NEGLIGENCE, 2.

Collision between wagon and street car—when failure to signal immaterial.

See NEGLIGENCE, 3.

Trespasser on railroad track struck by train—expert testimony raising question of fact as to ability to stop train.

See NEGLIGENCE, 4.

When pedestrian injured at railroad crossing not a regular employee of the defendant.

See NEGLIGENCE, 5.

Collision between trolley car and wagon—erroneous nonsuit.

See NEGLIGENCE, 6.

Injury by stepping upon electrically charged rail.

See NEGLIGENCE, 7.

Supplemental summons to bring in lessee of an elevated railroad to defend an injunction.

See PARTY, 1.

REAL PROPERTY.

1. *Lis pendens*—action for specific performance of personal covenant of grantee. When a grantee covenants to pay to the grantor any amount recovered in consequence of the destruction of easements by a railroad company, it is a personal covenant, does not run with the land, and does not affect the easements appurtenant thereto. Hence, the grantor in an action for the specific performance of such covenant is not entitled to file a *lis pendens*. *Schomacker v. Michaels*, 125.

2. *Escheat*—when title of State not divested by foreclosure. When a mortgagor dies without heirs capable of inheriting the lands escheat to the State which takes title subject to the mortgage. But as a sovereign State cannot be sued without its consent, the courts obtain no jurisdiction in an action of foreclosure as against the State, even though the Attorney-General be made a party defendant.

Under such circumstances the title of the State is not divested by the sale on foreclosure, and, if the Statute of Limitations has not run against the State, the purchaser's title is not marketable. *Seitz v. Messerschmitt*, 401.

3. *Acceptance of deed essential to pass title*. While the fact that a fully executed and valid deed is found in the possession of the grantee raises the presumption of delivery and acceptance, the question is one of intention, and the presumption may be refuted.

To pass title, acceptance by the grantee is as essential as delivery by the grantor. *Hamlin v. Hamlin*, 493.

4. *Same*—evidence varying written instrument. Proof tending to show that there was no intention to pass title does not fall within the condemnation of the rule prohibiting oral evidence to vary the terms of the written instrument. *Id.*

5. *Same*—facts not establishing acceptance. When it is shown that a husband, engaged in a hazardous business, paid the consideration for real estate and had the deeds drawn in the name of his wife, but took a reconveyance thereof from his wife, which instruments he never recorded, but kept in his safe deposit together with insurance on the property, payable only to the wife, and there is evidence of repeated statements that he intended that the property should belong to his wife, and that the conveyance was made solely that he might use the property, if necessary, in a business emergency, a finding that there was no acceptance of the reconveyance by the husband is warranted by the evidence. *Id.*

REAL PROPERTY — Continued.

6. *Infant — proceeding to sell real property — order of reference essential.* A proceeding to sell an infant's real property being in derogation of the common law must strictly comply with the statute. If in such proceeding there was no order of reference, the proceeding is absolutely void. *Hegeman v. Stearns Realty Co.*, 754.

7. *Sams — unmarketable title.* Although the record of such proceeding shows the confirmation of the report of a referee, the proceeding is invalid where the attorney who conducted it testifies that although he prepared an order of reference, it was never signed by a judge. A title acquired upon such sale is not marketable. *Id.*

8. *Watercourse — municipal corporations — duty of city of Yonkers relative to lands beneath the Hudson river — charge approved.* Chapter 562 of the Laws of 1899, granting to the city of Yonkers the fee of lands beneath the Hudson river at the mouth of the Nepperhan stream, which provides that said lands "shall be forever kept unobstructed and free from docks, piers or other structures preventing the use of the same by shipping," does not impose upon the municipality the duty to dredge the said lands for the benefit of private owners, but is intended merely as a limitation upon the grant and prohibits the city from using the lands so as to obstruct navigation. It does not require the municipality to remove from said waters obstructions created by other parties or by the natural action of the waters, and it is not error to so charge in an action against the municipality for alleged injuries sustained by the obstruction of the waters of the Hudson river whereby the plaintiff was prevented from reaching its docks. *Franklin Transportation Co. v. City of Yonkers (No. 1)*, 793.

Surrogate is without power to try issues involving title thereto.

See COURT, 6.

Judgment creditor's action to impress a trust upon real property in the hands of a grantee of the debtor.

See DEBTOR AND CREDITOR, 4.

Damages upon condemnation thereof.

See EMINENT DOMAIN.

Oral contract of partnership to deal in lands — effect of statute on oral contract between partners to convey — specific performance.

See PARTNERSHIP, 2, 3.

Claims of various real estate brokers for commissions.

See PRINCIPAL AND AGENT.

Vendee not charged with notice of recorded deed under covenant that lands are free from certain restrictions.

See VENDOR AND PURCHASER, 1, 2.

Vendee entitled to equitable lien on lands to the extent of consideration paid.

See VENDOR AND PURCHASER, 3-5.

Presumption of payment of mortgage after twenty years — when title marketable.

See VENDOR AND PURCHASER, 6,*7.

Implied power to sell real estate.

See WILL, 8.

Sale of.

See VENDOR AND PURCHASER, generally.

See LANDLORD AND TENANT, generally.

RECEIVER.

When court will not order summary cancellation of a lease by receiver of rents and profits.

See MORTGAGE, 1-3.

Prior judgment as bar on application of receiver to sell debtor's interest in real property.

See SUPPLEMENTARY PROCEEDINGS.

REFERENCE.

1. *Attorney and client*—summary proceeding to compel attorney to pay over—power of referee. A referee had in a summary proceeding to compel an attorney to pay over moneys to a client is for the purpose of informing the conscience of the court and the latter may adopt or disregard the report of the referee. The report, however, is entitled to consideration by reason of the fact that the referee saw and heard the witnesses. *Matter of Jones & C.*, 775.

2. *Same*—evidence. A referee ordered to report the evidence with his opinion is not bound to take irrelevant testimony; *contra*, if he be ordered to take testimony only. *Id.*

3. *Same*—when finding and conclusions need not be separately stated and numbered. The requirement of section 1022 of the Code of Civil Procedure, that the referee separately state and number the facts found and conclusions of law, does not apply to a summary proceeding to compel an attorney to pay over moneys to his client. *Id.*

Findings not incorporated in report.

See APPEAL, 1.

Case on appeal—request to find not part of judgment roll.

See APPEAL, 3.

When counsel fees proper on reference to assess damage upon denial of an injunction *pendente lite*.

See INJUNCTION, 2.

When reference in proceeding to sell infant's real property is invalid.

See REAL PROPERTY, 7.

RELEASE.

When release in former action does not bar creditor from sharing in trust property.

See DEBTOR AND CREDITOR, 2.

REQUISITION.

Extradition from New York to Porto Rico.

See EXTRADITION.

RULES.

[For table of the General Rules of Practice cited and construed in this volume, see *ante*, p. lx.]

SALE.

1. *Contract as to shipment of goods construed*—measure of damages for failure to deliver. In an action for the breach of a contract to deliver goods to be manufactured by the defendant for the plaintiff it appeared that the contract provided that the defendant was to sell four hundred barrels of the goods at the rate of six to eight barrels per week, the entire quantity to be taken prior to a fixed date. The above portion of the contract was typewritten, and annexed thereto was a printed specification headed "remarks" wherein it was provided that the purchaser should give the seller specifications for goods covering shipments not less than ten days before the time of shipment.

Held, that under said contract defendant was required to ship to plaintiff at least six barrels per week, and that a failure to do so was a breach of the contract;

That the printed remarks at the end of the contract referred only to cases where the provisions of the contract contained no specific obligation as to shipment;

That as the defendant's failure to deliver the goods was shown to have obliged the plaintiff to close its manufacturing plant, the plaintiff was entitled to recover as damage the loss of rent and interest on the capital invested in the factory. *Nicholls v. American Steel & Wire Co.*, 21.

2. *When parol evidence inadmissible to show that absolute bill of sale was intended to create trust*. A bill of sale, absolute upon its face, which recites that the vendor is indebted to the vendee for a sum of money not named, which he is desirous of paying, and that the assignment is made "to that purpose" cannot be shown by parol evidence to have been intended as an assignment and conveyance in trust to pay such sum as the vendor might be found to owe the vendee. *Nevius v. Nevius*, 236.

SALE — Continued.

3. *Same — accounting.* Hence, an action for an accounting against the vendee cannot be brought on the theory that the bill of sale was intended as a mortgage, for the action of accounting is not one to redeem the property and is inconsistent with such action. *Id.*

4. *Smuggled goods confiscated by government — facts requiring submission of case to the jury — principal and agent — evidence of agency — when principal not charged with knowledge of agent.* The defendant sold smuggled cattle which were subsequently confiscated by the Federal government. In an action by the buyer against the seller it was shown that the plaintiff gave a check to his agent to the order of the defendant to pay the purchase price, on the face of which was written "for five yearlings." The check was received and indorsed by the defendant and the cattle were actually delivered on the plaintiff's farm and remained there until seized. Shortly before the seizure the plaintiff told the defendant that he understood that officers were "after those cattle I bought of you, or Pond bought for me." The defendant replied that if they were seized he would settle.

On the issue as to whether the sale was made to the plaintiff or to his agent, Pond, *Held*, that it was error to dismiss the complaint on the theory that the cattle were sold to Pond and not to the plaintiff;

That the evidence required the submission to the jury of the question as to whether the sale was made to the plaintiff or to Pond;

That it was error to exclude the conversation between the plaintiff and his alleged agent in reference to the cattle prior to their purchase for the purpose of proving the agency;

That although the defendant gave evidence that the plaintiff's agent was told that the cattle were smuggled prior to his agency that knowledge was not chargeable to the principal in the absence of clear proof that the knowledge was present in the mind of the agent when the purchase was subsequently made. The burden is on the party seeking to charge a principal with knowledge of his agent, acquired at a different time and in a different transaction when he was not representing the principal, to show by clear evidence that the knowledge sought to be charged to the principal was present in the agent's mind at the time of the transaction in issue. *Badger v. Cook*, 828.

5. *Of stock induced by misrepresentation — facts raising question for jury.* The maker of a promissory note given in part payment of stock defended upon the ground that the purchase was induced by fraudulent representations by the plaintiff with respect to the value of the assets and stock of the corporation. On the trial it appeared that the parties had been friends for many years and that the plaintiff was director, president and member of the executive committee of the corporation, which was a trust company, and was familiar with its assets and financial condition; that the defendant who purchased the stock from the plaintiff was an engineer and had no knowledge or information respecting the financial condition of the corporation except as imparted by the plaintiff. It was shown that the defendant told the plaintiff that he intended to invest money in other stock and that the plaintiff urged the defendant to buy instead the stock of the trust company owned by him, at the time representing that the surplus of the company was intact, that its securities were good for their face value, that no loss from unfortunate investments would use up the surplus and that another financier was trying to buy the stock; that the plaintiff after selling the stock to the defendant resigned as an officer of the company; that the aforesaid representations proved to be false; that the defendant could have purchased the stock at a lower value in the open market, and that the corporation went into the hands of a receiver with the loss of its entire surplus and undivided profits and the impairment of its stock to half the face value.

On all the evidence,

Held, that the representations by the plaintiff could not, as a matter of law, be said to be mere expressions of opinion, but raised a question for the jury, and the direction of a verdict for the plaintiff was error. *Hawley v. Wicker*, 638.

Sale — mutual mistake — when corrected.

Green v. Smith, 920.

Facts raising question as to whether sale was absolute or conditional.

See CONTRACT, 12.

SERVICES.

Action on contract to supervise construction of work for percentage of total cost.

See CONTRACT, 11.

Inspection of books and papers granted where defendant counterclaims for moneys misappropriated.

See DISCOVERY, 2.

Action on *quantum meruit* for preparing plans of a house.

See EVIDENCE, 6.

Contract for.

See CONTRACT, generally.

See MASTER AND SERVANT, generally.

SESSION LAWS.

[For table containing all Session Laws cited and construed in this volume, see *ante*, p. lvii.]

SLANDER.

Actions for assault and slander cannot be united.

See PLEADING, 2.

SPECIAL SESSIONS, COURT OF.

Appeal from order of justice of Special Sessions sitting in Children's Court.

See APPEAL, 5.

SPECIFIC PERFORMANCE.

A finding that performance is impossible is a prerequisite to money damages.

See EQUITY.

Of oral contract of conveyance between partners dealing in lands refused.

See PARTNERSHIP, 3.

Lis pendens not permissible in action on personal covenant by grantee.

See REAL PROPERTY, 1.

Unaccepted option cannot be enforced.

See VENDOR AND PURCHASER, 8.

Payment of installment to agent contrary to contract.

See VENDOR AND PURCHASER, 9.

STATUTE.

[For tables of Session Laws and statutes cited and construed in this volume, see *ante*, pp. lv-lx.]

STATUTE OF FRAUDS.

When correspondence constitutes a contract.

See CONTRACT, 1.

Contract of employment not to be performed in one year — recovery upon executed contract although not in writing — when percentage of profits not permissible in action on *quantum meruit*.

See CONTRACT, 4.

When consideration expressed in written instrument cannot be varied by parol.

See CONTRACT, 14.

When oral contract to pay bonus void under the statute.

See CONTRACT, 19.

Defense of statute not considered on application for examination of books and papers.

See DISCOVERY, 1.

Oral contract of partnership to deal in lands — effect of statute on oral contract between partners to convey — specific performance.

See PARTNERSHIP, 2, 3.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTION.

STOCKHOLDERS' ACTIONS.

See CORPORATION, generally.

SUNDAY.

When sale of liquor on Sunday by hotelkeeper not made to guest.

See INTOXICATING LIQUORS, 1, 2.

SUPPLEMENTARY PROCEEDINGS.

Application of receiver to sell debtor's interest in real property — prior judgment as bar. A motion by a receiver in proceedings supplementary to execution for leave of sell a judgment debtor's interest in real property consisting of a remainder, will be denied when it appears that the question is *res adjudicata* by reason of the denial of a similar application and the dismissal of the complaint in a prior action brought for the same purpose by the receiver's predecessor.

Although the denial of the prior application and the dismissal of the prior action were made upon the erroneous legal conclusion that the receiver's right to sell the remainder must be postponed until the death of the life tenant, the prior decisions are nevertheless *res adjudicata* and bar a subsequent application for the same leave, and the receiver must await the death of the life tenant. *Barber v. Barnum*, 325.

SURROGATE.

Power to construe will. The Surrogate's Court has no inherent power to construe the provisions of a will except as a necessary incident to its general powers to control executors and testamentary trustees and to direct the payments or charging of legacies or the like. *Kirk v. McCann*, 56.

Decree settling accounts of guardian void for failure to serve citation upon infant.

See ATTORNEY AND CLIENT, 8.

Concurrent jurisdiction of surrogate and Supreme Court in accounting by representative of deceased trustee — no power to try titles of real estate.

See COURT, 5, 6.

No exception to sureties on undertaking after approval by surrogate — discretion of surrogate in examining sureties on appeal.

See PRACTICE, 7, 8.

Appeal from order of surrogate exempting estate from taxation.

See PRACTICE, 19.

When leave to amend petition asking probate of will should be granted.

See PRACTICE, 15, 16.

SURVIVORSHIP.

Rules as to proof of survivorship when several parties perish in the same disaster.

See EVIDENCE, 10.

TAX.

1. *When foreign banking corporation may be taxed — when capital is employed here.* A foreign banking corporation having a large office in this State, which sells foreign bills of exchange and pays drafts drawn upon it in this State, etc., does business in this State and is taxable, although it has no certificate permitting it to do business here.

When the business carried on by such banking corporation consists in selling its own drafts on its foreign branches and agents, drafts drawn by these agents upon the New York branch constitute moneys and credits employed and invested in this State and are subject to taxation.

Such demands and evidences of debt sent here for collection are not exempt from taxation by virtue of subdivision 13 of section 4 of the Tax Law, because they are held by the corporation itself and not by its agent, and because they are not sent here for collection but belong to the corporation and are used here in its business. *People ex rel. International Banking Corp. v. Raymond*, 62.

2. *Assignment of insurance policy if assignee survive insured — when not liable to transfer tax.* A policy of life insurance differs from other contracts in that it is not ordinarily intended to benefit the insured, but others after his death.

Hence, when one owning insurance policies which were originally payable to his estate assigns them to his wife if she survive him and the rights of no third

TAX — Continued.

parties have intervened and there is no conflict as to the title to the policies, they are not subject to the transfer tax on the death of the insured.

Such an assignment is not an assignment "intended to take effect in possession or enjoyment at or after such death," as contemplated by the statute. The assignee obtains an immediate right to enjoy the moneys when payable as death losses, even though the assignee's title may be defeated by her death during the lifetime of the insured. *Matter of Parsons*, 321.

3. *Same — effect of possession of policies.* The fact that the policies, with assignments attached thereto, were found in the safety deposit box of the insured, does not show that the duplicate assignments filed with the insurance company were not so filed by the assignee. Under such circumstances the deceased cannot be deemed to have been possessed of the policies at the time of his death, nor does the widow take title to them through his will or the laws of the State. *Id.*

4. *Gift of property to son on condition that he provide for donor's family — when transfer made in contemplation of death.* The decedent, being ill of a lingering disease which affected both mind and body, about three months prior to his death made an assignment of all his property to a son, said assignment being attached to a schedule and reciting that the son has "absolute control of the assets herein named." The son deposited the securities assigned in a safe deposit in the name of three trustees, one of whom was himself, the other two being the persons named as executors of the father's will. In a proceeding to assess a transfer tax the son testified that it was mutually understood that he should look after the welfare of his mother, brother and sister in the same manner as the decedent had always done, and as a matter of fact the securities after the donor's death were divided among his wife and children by the trustees. The decedent also transferred savings bank accounts so as to stand in his own name and that of his son "payable to either or the survivor of either." The son in making affidavit to the amount of the estate in the matter of the collection of an inheritance tax at first included the savings bank accounts, but thereafter maintained that they were included in ignorance of his legal right thereto. Upon all the evidence,

Held, that the gift was in trust for the benefit of the widow and next of kin of the donor and was not a trust for the benefit of the donor or a gift absolute to the son;

That the disposition of the property was clearly made in contemplation of death and subject to a transfer tax;

That under the statute, as amended, gifts *inter vivos* if made in contemplation of death are subject to a transfer tax, the tax not being restricted to gifts *causa mortis*;

That as attempts to evade the payment of a transfer tax are usually secret, circumstantial evidence may be sufficient to overbear the positive testimony of interested parties as to the intention of a disposition of the property. *Matter of Palmer*, 360.

5. *Statute of Limitations — statute does not run on liability of executors and beneficiaries for inheritance tax.* The provisions of sections 1 and 9 of chapter 713 of the Laws of 1887, holding administrators, executors, etc., liable for a transfer tax until the same is paid are in the nature of a penalty imposed for failing to discharge the duty commanded by law.

Whether or no a proceeding to collect a transfer tax is barred by subdivision 2 of section 382 of the Code of Civil Procedure after the expiration of six years (which does not seem to be the case) the collection of such tax is removed from the operation of the Statute of Limitations by chapter 737 of the Laws of 1899, providing that the provisions of the Code of Civil Procedure relative to limitations shall not apply to proceedings to levy, collect, etc., any taxes or penalty prescribed by articles 9 or 10 of chapter 908 of the Laws of 1896.

The act aforesaid is retroactive and intends to relieve proceedings under the Inheritance Tax Law from the bar of the statute, except as to innocent purchasers of real estate who are relieved from the lien created by the statute after the expiration of six years. But this exception does not apply to executors, administrators, trustees or beneficiaries. Representatives have no right to permit property on which the State has a lien for taxes to pass out of their possession or control until the lien has been discharged, and the property comes into the possession of the beneficiaries subject to that lien, and hence the Legis-

TAX — *Continued.*

lature has power to remove the bar of the Statute of Limitations in such cases.
Matter of Strang, 796.

Certiorari as matter of right where petition shows erroneous assessment.
See CERTIORARI, 1.

Appeal from order of surrogate exempting estate from taxation.
See PRACTICE, 19.

TAXPAYERS' ACTION.

When action does not lie to restrain acceptance of bid — purpose of action.
See MUNICIPAL CORPORATION, 8.

TORT.

Stockbroker as joint tortfeasor with principal — settlement by broker.
See CONTRACT, 8.

When trustee who has participated in illegal transfer of property may bring action to rescind the same.
See EXECUTOR AND ADMINISTRATOR.

Actions for assault and slander cannot be united.
See PLEADING, 2.

Action for damages for breach of contract and for fraud in inducing the same are inconsistent.
See PLEADING, 18.

TRANSFER TAX.

When policies assigned to wife, if she survive insured, not liable to transfer tax.
See TAX, 2.

Transfer of securities to son made in contemplation of death.
See TAX, 4.

Statute of Limitations does not run on liability of executors and beneficiaries for inheritance tax.
See TAX, 5.

TRANSPORTATION CORPORATIONS LAW.

See GAS AND ELECTRICITY.

TRESPASS.

Entry upon private lands by contractor improving Erie canal without filing map, etc.
See EMINENT DOMAIN, 2.

Trespasser on railroad track struck by train.
See NEGLIGENCE, 4.

TRIAL.

1. *Refusal to ask jury if they are unable to agree.* When in a criminal action the jury comes in and asks if one juror can legally change his belief for the purpose of agreeing with other jurors, an exception to the court's refusal to inquire whether the jury could possibly agree upon a verdict is not well taken, if there is nothing to show that the jury were unable to agree or requested to be discharged. *People v. Koerner, 40.*

2. *Motion to discharge.* Nor under such circumstances is it error for the court to refuse to hear the defendant's motion to discharge the jury in their presence. When a jury having been out nearly fifty-seven hours ask for instructions, the court by requesting them to make further endeavors to reconcile their differences does not coerce a verdict. *Id.*

3. *Discussion of instruction of a witness before jury.* When a trial justice suspects that a witness on the stand is being instructed by some one in the court room, it is better practice to direct the jury to retire before calling the attention of the prosecution to the fact; but if subsequently the jury are plainly instructed to disregard the incident, it is not reversible error. *Id.*

4. *Tender by defendant with payment into court — when judgment for amount of tender with costs not authorized.* When before action brought to recover the

TRIAL — *Continued.*

value of stock alleged to have been intrusted to defendant for sale, the defendant tenders the proceeds of the sale and on the refusal of the tender deposits the sum in court, the defendant is entitled to a verdict if the plaintiff fails to establish a right to more than the sum tendered.

When the plaintiff fails to recover more than the tender, he is not entitled to costs. *Goldman v. Swartwout*, 185.

5. *Same* — *appeal* — *reversal after submission of case on erroneous theory.* Under such circumstances the defendant is entitled to prove the tender and deposit as a defense of payment, and when the court rejects such evidence and charges that the jury is to render a verdict for the amount of the tender if that be found to be the amount the defendant received for the stock, or a verdict for a larger amount if a larger amount were received, the case is submitted upon an erroneous theory, and a verdict for the amount of the tender with costs will be reversed, although the defendant took no exception to the charge. The error is available under an exception to the denial of a motion for a new trial on the ground that the verdict was contrary to law. *Id.*

6. *Failure to produce witness* — *right of opponent to comment thereon.* When a physician who treated the plaintiff for injuries complained of and injuries received in a prior accident is not produced upon the trial as a witness, the opposing counsel may call attention to the fact and comment upon it with a view to having the jury infer that the physician was not called because his testimony would not have been favorable to the plaintiff.

It is improper to rule that because the plaintiff was forced to trial the absence of the physician cannot be commented upon, especially where the plaintiff has sought to explain his absence and the jury has had full benefit of the explanation. *Brotherton v. Barber Asphalt Co.*, 791.

When plaintiff on second verdict entitled to costs of both trials.

See COSTS, 5.

Right to new trial on payment of costs compelled by execution.

See EJECTMENT.

A finding that specific performance is impossible is a prerequisite to money damages.

See EQUITY.

Failure to charge that principal was chargeable with agent's knowledge.

See NEGLIGENCE, 3.

Proof of action on contract warrants recovery although conversion is also stated.

See PLEADING, 11.

When adjournment should be granted to allow production of documentary evidence.

See PRACTICE, 20.

Change of place of trial.

See VENUE.

TRUST.

1. *Savings bank* — *deposit in trust for another* — *when trust tentative.* A deposit by one person of his own money in his own name in trust for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. If the depositor die before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor. But until the depositor's death the funds are impressed with no trust in the sense that any title thereto, actual or beneficial, vests in the proposed beneficiary unless the depositor shall have completed the gift as aforesaid, and the trust remains inchoate and incomplete. *Matter of United States Trust Co.*, 178.

2. *Same* — *when widow of beneficiary not entitled to deposit.* When it appears that one deposited money in his own name in a savings bank in trust for his son and the son died before the depositor, the tentative trust was never consummated

TRUST — Continued.

so as to vest the son during his lifetime with any title or interest in the moneys, and hence the widow of the son is not entitled to the deposit on the death of the depositor. On the death of the son before the depositor, the trust terminated *ipso facto* and no action on the part of the depositor was necessary to end it. *Id.*

8. *Same — evidence — transactions with deceased depositor inadmissible.* In an action by the widow of the former beneficiary against the estate of the depositor evidence that she or her husband knew of the deposit is inadmissible, being immaterial unless the fact had been communicated by the depositor, and she being incompetent to testify to personal transactions with the deceased.

Nor is evidence admissible to show that the depositor's wife contributed some of the money deposited. *Id.*

4. *Cause for removal of trustee.* A trustee appointed by will or deed will not be removed for violation of duty, or even breach of trust, if the fund is in no danger of being lost, and the court will only interfere when it is necessary to save the trust property. There must be such misconduct as to show want of capacity or fidelity, putting the trust in jeopardy. *Matter of Thieriot*, 686.

Agreement of creditors to prosecute claims for mutual benefit — one purchasing debtor's property holds as trustee for others — when release in former action does not bar creditor from sharing in trust property — reimbursement of trustee.

See DEBTOR AND CREDITOR, 2.

When trustee who has participated in illegal transfer of property may bring action to rescind the same.

See EXECUTOR AND ADMINISTRATOR.

Income from trust in mother's will used when father unable to support infant.

See PARENT AND CHILD, 8.

Power of surviving partner to whom, as executrix, the will of deceased partner gives controlling interest in business.

See PARTNERSHIP, 1.

When parol inadmissible to show that absolute bill of sale was intended to create trust.

See SALE, 2.

Gift to son in trust for benefit of widow.

See TAX, 4.

Unlawful accumulation for the payment of mortgages and for investment — settlement of accounts binding as to prior accumulations.

See WILL, 1-4.

For the payment of annuities not confined to income.

See WILL, 7.

UNITED STATES.

[For tables of sections of the United States Constitution and statutes cited and construed in this volume, see *ante*, p. lv.]

USURY.

When defense of usury not available against State bank.

See BILLS AND NOTES, 6.

VENDOR AND PURCHASER.

1. *Express covenant that lands are free from certain restrictions.* When a vendor covenants to convey real estate free of all incumbrances "except existing covenants as to nuisances, if any, which do not, however, prevent the erection of stores or tenement houses," and it is shown that the premises are subject to a restrictive covenant prohibiting the erection of any building less than two stories in height or any building without a cellar or any building costing less than \$2,500, the title is not free of incumbrances and the vendee is entitled to recover the earnest money. *Levin v. Hill*, 472.

2. *Same — vendee not charged with notice of recorded deed contradicting such covenant.* In such case a vendee is not chargeable with notice of such covenant, although it is of record, if the contract of sale does not specify any particular deed but speaks generally of covenants against nuisances.

VENDOR AND PURCHASER — Continued.

Contra, if the contract provide that the premises are to be taken subject to a covenant against nuisances in a specified deed. In such case the purchaser is charged with notice thereof. *Id.*

3. *Equitable lien — vendee entitled to lien on lands to the extent of consideration paid.* The vendee of lands has an equitable lien thereon for the portion of the consideration thereof paid by him under the executory contract, or for sums expended in improvement, and may enforce that lien in equity so long as the failure to carry out the sale has not been the result of any default on his part.

The vendee may enforce his lien when the title proves to be unmarketable. *Occidental Realty Co. v. Palmer*, 505.

4. *Same — trust in equity.* The lien rests wholly upon the theory that the vendor in equity holds the land in trust for the vendee in proportion to the part of the purchase money paid by the vendee or for sums expended in improvements.

The right of the vendee to enforce his lien in equity cannot be defeated upon the ground that there is an adequate remedy at law. *Id.*

5. *Same — costs.* As the lien exists only for the portion of the consideration paid or moneys expended in improvement, the vendee is not entitled to a lien for the cost of examining the title.

In an action to foreclose such vendee's lien an extra allowance should be limited to five per cent upon the sum sought to be recovered and should not be figured upon the agreed price. *Id.*

6. *Evidence — presumption of payment of mortgage after twenty years.* After a mortgage debt has been due twenty years, there is a conclusive presumption of payment in the absence of proof of part payment within that period, and such presumption may be invoked where the marketability of the title is in question. *Ourier v. Mahon*, 749.

7. *Same — when title marketable.* Hence, a purchaser on partition sale will be compelled to take title although the lands are covered by five mortgages unsatisfied of record, if all were due more than twenty years before date of sale and there is no proof of any payment of principal or interest within that period. *Id.*

8. *Correspondence not constituting contract of sale — no specific performance of unaccepted option.* In an action for the specific performance of an alleged contract to convey lands which had been sold by the owners to third parties it was shown that the plaintiff had telegraphed to the owners making an offer for the property "free and clear." The owners replied, "Will take cash above all liens which you must assume." Plaintiff replied, "Will you accept \$50,000 cash, I assuming all liens?" to which the owners answered, "Will take \$60,000 cash above all liens and commissions." Thereafter the plaintiff telegraphed, "Will you give thirty day option at last figures?" to which the owners replied, "Will give thirty day option. Notify Blackwell" (the latter being the owners' real estate agent), to which plaintiff two days afterwards replied, "Your cable granting option received. Have accepted option. Notified Blackwell."

Held, that the correspondence did not constitute a contract of sale, but a mere option or continuing offer, which, not being founded upon a consideration, was subject to withdrawal at any time before acceptance by the plaintiff;

That the sale to third persons was a withdrawal of the option.

That mere assent to an offer of an option is not a purchase thereunder;

That the plaintiff was not entitled to specific performance, which will never be decreed unless there be mutuality of contract. *Pomeroy v. Newell (No. 2)*, 800.

9. *Sale of lands to be paid for by installments — payment to agent contrary to contract.* When an executory contract for the sale of lands, the consideration to be paid in installments, provides that the vendor's agents are "not permitted to collect installments," a vendee who has paid installments to the vendor's agent, and who sues for specific performance of the contract, is not entitled to a judgment allowing him for the installments paid. *Metz v. Harbor & Suburban Building & Savings Assn.*, 825.

Broker's agreement to release vendor from payment of commissions as consideration for vendee's promise to pay moneys.

See CONTRACT, 16.

VENDOR AND PURCHASER — *Continued.*

Action by vendee under an executory contract to sell lands against his assignee and the vendor to determine title.

See PLEADING, 5.

Claims of various real estate brokers for commissions.

See PRINCIPAL AND AGENT.

VENUE.

1. *Practice — change of venue denied.* Where the answer contains a long and confusing statement of facts and the issues raised thereby are in doubt, the venue should not be changed for the convenience of defendant's witnesses as their materiality cannot be determined.

Neither will the venue be changed for the convenience of possible witnesses to the facts alleged in a defective counterclaim, as their convenience is best served by leaving them at home. *Hurley v. Roberts*, 837.

2. *Practices — change of venue granted.* In an action for breach of contracts made and to be performed in the city of New York by parties engaged in business there, an assignee of one party who resides in Rockland county, but who is engaged in business in New York, and who is in the employ of his assignor, is not entitled to retain the venue in Rockland county. This, not on the ground of convenience of witnesses, but because the cause of action arose in New York county. *Brady v. Hogan*, 898.

WAIVER.

By infant of preference, by default on motion therefor.

See PRACTICE, 13, 14.

WATERCOURSE.

Condemnation by municipality of existing water works without consent of State Water Commission.

See EMINENT DOMAIN, 5.

Acquisition of piers by city of New York — compensation for "shedding license" taken.

See EMINENT DOMAIN, 6.

When city liable for damages caused by dilapidated sewers.

See MUNICIPAL CORPORATION, 11.

Duty of city of Yonkers under covenant to keep docks in Hudson river unobstructed.

See REAL PROPERTY, 8.

WILL.

1. *Unlawful accumulation — payment of mortgages.* A trust which directs the trustees to apply surplus income to the payment of mortgages upon real estate of which the testator died seized constitutes an unlawful accumulation and is invalid. *Kirk v. McCann*, 56.

2. *Same — investment.* So, too, a direction to invest surplus income of the trust fund in bond and mortgage until the termination of the trust period of two lives is an unlawful accumulation and invalid. *Id.*

3. *Same — when judicial settlement of trustees' accounts binding.* But when the accounts of the trustees showing such application of the surplus income and investment thereof have been judicially settled by the surrogate on the appearance of all parties without objection, the decisions are binding so long as they stand unreversed and are *res adjudicata*, irrespective of whether the parties are adults or infants if represented by special guardian. *Id.*

4. *Same — settlement of accounts does not authorize subsequent illegal accumulations.* But the decisions are binding only as to accumulations and investments already made and passed upon by the surrogate, and are not controlling as to a new application of the surplus income, and form no bar to a subsequent adjudication holding the direction invalid as to property subsequently coming into the hands of the trustees. *Id.*

5. *Construed — counsel fees.* A testator bequeathed the use of the sum of \$2,000 to his niece for life, providing that if at any time she should have a child

WILL—*Continued.*

or children who should arrive at the age of ten years, she should have the sum absolutely. If the beneficiary died before the child arrived at ten years of age the sum was given to her child or children if she had any. If she died without child or children, the legacy was to go to a missionary union, which was also made the residuary legatee. By a codicil the testator provided that whereas he had given his niece the use of \$2,000 for and during her natural life, he now in his codicil gave and bequeathed to her "the use of \$2,000 more, making \$4,000 for and during her natural life. At her death the principal to go as given and directed in my said will."

Held, that the testator intended to give to his niece the life use of \$4,000 instead of \$2,000, and that in the event of her having a child who should arrive at the age of ten years, the \$4,000 should be hers absolutely;

That even though the codicil were ambiguous in respect to the absolute right to \$4,000, if a child attained the age of ten years, that construction would be given which preferred those of the blood of the testator to strangers;

That counsel fees paid by the executor to collect moneys from the coexecutor was properly chargeable to the estate, being paid not solely for his own benefit but for that of the estate as well. *Matter of Edie*, 310.

6. *When absolute ownership of personal property not suspended.* There can be no suspension of absolute ownership of personal property when there are persons in being who unitedly can convey an absolute title.

The mere creation of a trust does not *ipso facto* suspend the power of sale. *Wells v. Squires*, 502.

7. *Same—annuities payable out of principal.* Thus, when a will bequeaths the residuary estate in trust to pay over annuities to each of three beneficiaries named during their natural lives, and the payment of annuities is not limited to payment out of the income, but payment may be made out of the principal if necessary, there is no suspension of absolute ownership obnoxious to the statute.

The power of such beneficiaries to convey absolute title by uniting with the remaindermen and trustee is not prohibited by section 3 of the Personal Property Law forbidding the assignment by a beneficiary of the right to enforce a trust of personal property, as that section is limited to cases where the trust is to receive the income and apply it to the use of any person. *Id.*

8. *Implied power to sell real estate—when title offered by executors marketable.* It is a general rule that a power of sale will be implied where the manifest intent of the testator requires that real estate should be sold and converted into money in order to carry out the provisions of the will. The application of the rule depends upon the particular provisions of the will in question.

When a testatrix in creating a trust for the benefit of children living at her death, or for the issue of those who have predeceased her, provides that the executors shall "pay over" to the beneficiaries their "part or portion" of the estate, and speaks of the "portions or parts of such sums set apart" for the use of the beneficiaries, and uniformly throughout the clauses making disposition of the property uses the words "pay over" the portions "of said fund," and provides that "upon all sales" which may be made by the executors the purchasers shall not be answerable for a misapplication of the proceeds by the executors, it is clear that the testatrix intended that her estate be converted into money, and the executors have an implied power of sale.

The implied power of sale is so clear as to impose no cloud upon the title, and a vendee will be decreed to accept the deed tendered by the executors. *Burnham v. White*, 515.

9. *When gift to charitable institution not in violation of chapter 360 of the Laws of 1860—gift to corporation not in esse.* The testator, after specific bequests, bequeathed and devised the residue of his estate to an executor in trust to collect the rents and income and pay the same over to his wife for life. Upon her death he devised a certain sum to persons named, and the excess of the residue over the sum stated to a charitable corporation directed to be formed by his executor. The will further provided that should the wife predecease the testator, the bequest to the corporation should take effect at his death. There being no proof whatever as to whether the testator or his wife had perished first, it was contended that the gift to the charitable corporation was void under chapter 360 of the Laws of 1860, providing that no person having a husband, wife, child or parent, etc., shall give by will to any charitable, etc., corporation more

WILL — Continued.

than one-half of his or her estate, after the payment of debts and that the gift shall be valid to the extent of one-half only, on the theory that such gift is invalid if the testator have a wife living at the time of making the will.

Held, not so; that the validity of such gift depends upon the survivorship of one of the persons enumerated in the act, as a will does not take effect at the time of execution but only at the death of the testator;

That a bequest or devise in violation of said statute may be attacked by other than those enumerated in the act, and heirs or next of kin have a standing to be heard on the question;

That the word "having" a husband, wife, child or parent should be construed to mean "leaving" such persons surviving;

That as the will provided for the formation of the corporation after the death of the testator's wife and that the bequests to it should take effect at his death if she predeceased him, the will should be construed to mean that the bequest was to vest in the corporation if *in esse* at the death of the wife, but if not then *in esse* to vest when it was formed by the trustee, and hence the gift did not fail as being a gift *in presenti* to a corporation not in existence at the testator's death;

That the law favors charitable bequests whether to be administered at home or abroad, and the right of a foreign beneficiary to take will be determined by our courts before directing the executors to turn over the fund. But the right of a foreign corporation to take must be determined by the law of the foreign jurisdiction unaffected by our law relating to accumulations and perpetuities. *See: John v. Andrews Institute*, 698.

10. *Same — suspension of power of alienation.* Regardless of the question as to whether chapter 701 of the Laws of 1893 empowers a charitable corporation to take, as a suspension of the power of alienation is permissible during a period necessary to form a corporation to take a gift, not exceeding two lives in being at the death of the testator, the gift was valid as an executory devise or bequest. *Id.*

11. *Same — when existence of foreign corporation cannot be questioned here.* When such foreign charitable corporation has been formed under the laws of Ohio and under an act passed after the death of the testator, though not referring expressly to the corporation, it is a *de facto* corporation acting under color of law, and its right to the gift cannot be attacked on the theory that the act was in violation of section 1 of article 18 of the Constitution of Ohio, which prohibits special acts conferring corporate powers. Especially is this so when its corporate existence may be sustained under other statutes of Ohio.

Under the authority to determine whether such foreign corporation is competent to take, the court may determine the extent of its corporate authority, but not its right to corporate existence. *Id.*

12. *Same — equitable conversion.* When an executor is directed to incorporate an educational institution and to turn over to it the residue of the estate in cash, there is an equitable conversion of the realty into personalty as of the date of the death of the testator. As gifts in trust for charitable uses are deemed absolute gifts so far as the testator is concerned in order to enable the beneficiary to take, the rents and profits of the real property directed to be converted as aforesaid during the period intervening between the death of the testator and the formation of the corporation are to be paid over to the beneficiary and are not unlawful accumulations under section 51 of the Real Property Law and section 4 of the Personal Property Law. *Id.*

13. *Same — when corporation entitled to increase of funds.* Moreover, even if such corporation be not entitled to take said rents and profits under the will, it is entitled thereto under section 53 of the Real Property Law and section 2 of the Personal Property Law, when it is the party entitled to the next eventual estate.

Such corporation under the will aforesaid is the party entitled to the next eventual estate, although not incorporated at the time of the death of the testator. *Id.*

14. *Construed — direction that executrix continue partnership business — proper division of income therefrom — estoppel by legatees assenting to division — when executrix should not be charged with payment of tax recoverable from government.* A testator directed his executrix to continue the business of a partnership of

WILL — *Continued.*

which the testator was a member, and "subject to the provisions relative to my co-partnership business" directed the executrix to sell the residue of the estate on such terms as she deemed best and to receive the proceeds thereof and the proceeds and income from the partnership business which he bequeathed; one-third to his wife absolutely, one-third in trust, net income to the wife for life with remainder over to other relatives, the remaining one-third to go to the testator's relatives. There being no residuum of the estate above the copartnership business, the executrix divided the income and receipts from the partnership under the terms of the will aforesaid.

On the issue as to whether the income from the partnership should be treated as part of the principal fund of the estate and was to be divided in the same manner,

Held, that such construction should be given;

That in any event adult legatees who had consented to and shared in such division of the estate for five years were estopped from asserting a different basis of division;

That although the executrix had paid a Federal tax not properly chargeable to the estate and which was recoverable from the government, she should not be charged personally with the amount. *Matter of Marx*, 890.

Rules as to proof of survivorship when several parties perish in the same disaster.

See EVIDENCE, 10.

Income from trust in mother's will used when father unable to support infant.

See PARENT AND CHILD, 8.

Power of surviving partner to whom, as executrix, the will of deceased partner gives controlling interest in business.

See PARTNERSHIP, 1.

Power of surrogate to construe will.

See SURROGATE.

See EXECUTOR AND ADMINISTRATOR, generally.

See TRUST, generally.

WITNESS.

Party may not contradict his own witness.

See EVIDENCE, 1.

Erroneous admission of prior statements in corroboration.

See EVIDENCE, 5.

Discussion of instruction of witness before the jury.

See TRIAL, 8.

Right to comment on failure to produce witness.

See TRIAL, 6.

YONKERS (CITY OF).

Duty of city of Yonkers under covenant to keep docks in Hudson river unobstructed.

See REAL PROPERTY, 8.

Ex. & C.A.
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